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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-

STATE OF MAINE AND MICHAEL R. PETIT, COMMISSIONER OF THE DEPARTMENT OF HUMAN SERVICES, STATE OF MAINE

Petitioners,

v.

JOLINE THIBOUTOT AND LIONEL THIBOUTOT AND ON BEHALF OF OTHERS SIMILARLY SITUATED,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE STATE OF MAINE

RICHARD S. COHEN
ATTORNEY GENERAL OF THE STATE OF MAINE
JOHN M. R. PATERSON
DEPUTY ATTORNEY GENERAL
JAMES EASTMAN SMITH
ASSISTANT ATTORNEY GENERAL
STATE HOUSE
Augusta, Maine 04333
(207) 289-3661
Counsel for Petitioners, State of Maine and Michael R. Petit

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Petitioners,

v.

JOLINE THIBOUTOT AND LIONEL THIBOUTOT AND ON BEHALF OF OTHERS SIMILARLY SITUATED

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE STATE OF MAINE

The Attorney General of the State of Maine, on behalf of the petitioners State of Maine and Michael R. Petit, Commissioner of the Maine Department of Human Services, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Judicial Court of the State of Maine entered in this proceeding on August 31, 1979.

OPINIONS BELOW

The opinion of the Maine Supreme Judicial Court is reported at 405 A.2d 230 (Me. 1979) and is included herein as Appendix A. The unreported opinion of the Maine Superior Court for Sagadahoc County is included herein as Appendix B.

JURISDICTION

The judgment of the Supreme Judicial Court was entered on August 31, 1979 and the petitioners have filed this petition for certiorari within the required time. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Whether 42 U.S.C. §1983 affords respondents a remedy in a state court for deprivation of rights under the Social Security Act even where those rights were not of constitutional dimension.

2. Whether the petitioner's good faith violation of the Federal Social Security Act and its regulations, with resulting incorrect reductions of AFDC benefits to respondents, without a violation of constitutional rights, constitutes a violation of section 1983.

3. Whether the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. §1988, entitles respondents to attorney's fees in an action where the Court found no violation of constitutional rights.

STATUTES INVOLVED

United States Code, Title 42:

§602

(a) A State plan for aid and services to needy families with children

must...(7)except as may otherwise be provided in clause (8), provide that the State agency shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children, or any other individual (living in the same home as such child and relative) whose needs the State determines should be considered in determining the need of the child or relative claiming such aid, as well as any expenses reasonably attributable to the earning of any such income.

§1983

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress.

§1988

In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal

Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorneys fees as part of the costs.

STATEMENT OF THE CASE

The named plaintiffs, Lionel and Joline Thiboutot, are married with eight children: four are common to the marriage, one is Joline Thiboutot's by a prior marriage and three are Lionel Thiboutot's by a prior marriage. Before November, 1975, Lionel Thiboutot received AFDC benefits based upon a regulation promulgated by the State of Maine which the United States Department of Health, Education and Welfare found out of compliance with Federal regulations. In November of 1975, the Maine Department of Human Services, acting on its good faith belief that a reduction in Lionel Thiboutot's AFDC benefits was deemed to be required by a change in Federal regulations, notified Lionel Thiboutot of same. The change was essentially as follows: In computing the available income of Lionel in order to determine the amount of AFDC benefits allowed for Lionel's three children by his former marriage, the Department would no longer subtract that portion of Lionel's income which went to the support of the four children of both Lionel and Joline (those children not being eligible for AFDC benefits), although Lionel was required by law to support those children and did in fact support them.

The Thiboutots pursued their administrative remedies in an effort to get the Department to revise its ruling. A final adverse decision was rendered by the Commissioner on March 18, 1976. From that decision the Thiboutots filed a timely appeal under Rule 80B, M.R.Civ.P., alleging that the Commissioner's decision was in violation of state and federal statutes. Both the State of Maine and David Smith, as Commissioner of the Maine Department of Human Services, were named as defendants, with the latter having been succeeded by petitioner Michael R. Petit as Commissioner.

On January 7, 1977, an Amended Complaint was filed seeking class relief as well as relief for the Thiboutots. The Amended Complaint, brought pursuant to 42 U.S.C. §1983 as well as Rule 80B, alleged violation of the Social Security Act, 42 U.S.C. §602(a)(7), and pertinent federal regulations.

A motion for a separate trial on the issue of liability was granted on June 17, 1977. On July 15, 1977, judgment was entered for the Thiboutots on the merits. Defendants were enjoined from enforcing the challenged regulation, and ordered to adopt new regulations, notify all class members of the new regulations, and pay benefits prospectively to eligible class members. The trial court reserved decision on retroactivity of relief and on the right to an award of attorney's fees.

Defendants complied with the order. On February 27, 1978, final judgment was entered ordering retroactive benefits for the Thiboutots but denying plaintiffs' motions for retroactive benefits for the class and for attorney's fees. Plaintiffs appealed from this judgment while defendants did not cross-appeal.

The petitioners argued before the Supreme Judicial Court of the State of Maine, *inter alia* that 42 U.S.C. §1983 is not applicable to a case such as this one since none of the plaintiffs "civil rights" had been violated. *Brief of Appellee* pp. 15, 23; that §1983 contemplates tort liability, which was not present in the case at hand, p. 13; that §1983 was meant to apply to the denial of fundamental rights asserted pursuant to a claim under the Fourteenth Amendment of the United States Constitution, p. 15; that in order to assert a claim under the Fourteenth Amendment thereby invoking the protection of §1983, a denial of due process or equal protection of the laws must be alleged and found; and also that the Social Security Act was intended to provide its own remedies, exclusive of other legislation, except in cases concerning violation of personal liberties or acts of bad faith.

The Supreme Judicial Court rejected these arguments and, after final judgment concerning the 42 U.S.C. §1983 issue, remanded the case to the Superior Court of Sagadahoc County for a determination as to whether or not attorneys fees should be awarded to plaintiffs counsel. However,

the Court found, *inter alia*, that a right exists to sue under 42 U.S.C. §1983 in state court; a similar right exists to enforce the provisions of the Social Security Act even though the claim is not of constitutional dimension; and an award of attorney's fees may be appropriate pursuant to 42 U.S.C. §1988 even though no constitutional rights have been violated. (*Appendix*, p.14 A.)

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS WITH *CHAPMAN V. HOUSTON WELFARE RIGHTS ORGANIZATION* AND OTHER LOWER FEDERAL COURT DECISIONS

The decision below is inconsistent with recent federal decisions which have permitted the invocation of 42 U.S.C. §1983 conjointly with the Social Security Act as long as the latter statutory claim involved a common nucleus of operative fact with the Federal constitutional claim. *Seals v. Quarterly County Court*, 562 F.2d 390, 392 (6th Cir. 1977). The constitutional claim must be "substantial" in order for §1983 to apply. *Hagans v. Lavine*, 415 U.S. 528 (1973).

In the present case, the Supreme Judicial Court of Maine has concluded that "section 1983 afforded appellants a remedy in Superior Court for deprivation of rights under the Social Security Act even though those rights were not of constitutional dimension." (Emphasis added) *Appendix* p.14 A. That conclusion is clearly in-

consistent with *Hagans*, *supra*, and *Seals*, *supra*.

More importantly, the reliance by the Maine Supreme Judicial Court on *Chapman v. Houston Welfare Rights Organization*, U.S. , 99 S.Ct. 1905, (1979), has clearly demonstrated to this Court the indecisiveness with which it, and by implication, other state courts are faced when confronting the questions posed in this petition. *Appendix* p.13 A. Indeed, relying mainly on the *Chapman* case, *supra*, and extending the language therein to include cases where no rights of constitutional dimension are found to exist, much less be violated, goes against not only *Chapman* but establishes a dangerous precedent whereby a plaintiff merely has to plead 42 U.S.C. §1983, and, if he prevails on a Social Security Act claim, attorney's fees will be considered pursuant to the Civil Rights Attorney's Fees Awards Act of 1976. Such a result will be devastating to state treasurers.

By granting this petition, the Supreme Court could review the Maine Court's mistaken postulation that "four members of the Court think §1983 is available for relief in such a case and three think it is not" while "[t]wo justices, members of the majority, expressed no opinion on the scope of §1983." *Appendix* p.13 A.

2. THE RESPONDENTS "CIVIL RIGHTS" WERE NOT AN ISSUE IN THIS CASE - SECTION 1983 IS NOT APPLICABLE.

Chapman v. Houston Welfare Rights Organization, *supra*, clearly stands for the proposition that 42 U.S.C. §1983 does not provide any substantive rights but only creates a right to sue to vindicate such rights. Similarly, *Chapman* holds that the Social Security Act is not a statute providing for the protection of civil rights. Indeed, language supporting the preceding assertions is found within *Chapman*:

"...[S]ection 1983, when properly invoked, satisfied the first requirement [that under 28 U.S.C. §1343(3) a civil action must be authorized by law]: it ensures that the suit will not be dismissed because not 'authorized by law': But it cannot satisfy the second, since by its terms, as well as its history, it does not provide any rights at all.

"We reach a similar conclusion with respect to the argument that §1983 is a statute 'providing for the protection of civil rights, including the right to vote: Standing alone, §1983 clearly provides no protection for civil rights since, as we have just concluded, §1983 does not provide any substantive rights at all. To be sure, it may be argued that §1983, does in some sense 'provid[e] for the protection of civil rights when it authorizes a cause of action based on the deprivation of civil rights guaranteed by other Acts of Congress. But in such cases, there is no question as to jurisdiction, and no need to invoke §1983 to meet the 'civil rights' requirement of §1343(4); the Act

of Congress which is the actual substantive basis of the suit clearly suffices to meet the requisite test. It is only when the underlying statute is not a civil rights act that §1983 need be invoked by those in claimants' position to support jurisdiction. And in such cases, by hypothesis, §1983 does not provid[e] for the protection of civil rights."

47 U.S.L.W. 4528 at 4533 (1979) (emphasis added, footnote omitted).

The Court went on to state,

* * * *

"[T]he Social Security Act does not deal with the concept of 'equality' or with the guarantee of 'civil rights,' as those terms are commonly understood...

* * * *

"...the courts of appeals have consistently held that the Social Security Act is not a statute providing for 'civil rights' ....[W]e endorse those holdings, and find that a similar conclusion is warranted with respect to §1343(4) as well..." *Chapman, supra* at 4534.

The import of the above quotes seems clear. A bare allegation of a 42 U.S.C. §1983 violation does not create a "civil rights" claim, for it merely creates a right to sue to enforce a separately existing constitutional right. As may be gleaned from *Chapman*, this right is not to be found in the Social Security Act.

Mr. Justice Stewart, in remarks applicable to the present action, stated:

"[F]inally, even a welfare recipient with a federal statutory claim may sue in federal court if his lawyer can link this claim to a substantial constitutional contention. And under the standard of substantiality established by *Hagans v. Lavine*, 415 U.S. 528, such a constitutional claim would not be hard to construct." *Chapman, supra*, 47 U.S.L.W., at 4548. Petitioners assert that the converse of the above is also true, that without a claim of constitutional dimension, a 42 U.S.C. §1983 claim cannot survive.

3. THE COURT SHOULD GRANT CERTIORARI TO REVIEW THIS CASE IN CONJUNCTION WITH *EDWARD W. MAHER V. VIRGINIA GAGNE.*

This Court has recently granted certiorari in the case of *Edward W. Maher v. Virginia Gagne, cert. granted No.* 78-1888 (Oct. Term 1979) to review the following questions:

1. Whether, in an action combining a constitutional claim under 42 U.S.C. §1983 with a statutory claim under the Social Security Act, which is subsequently settled by entry of a consent decree, and the merits of the §1983 claim are never determined, an award of attorney's fees against the Connecticut Commissioner of Income Maintenance, in his official capacity, to be paid out of State funds, is authorized by the Civil Rights Attorney's

Fees Awards Act of 1976.

2. Whether, as the Court of Appeals has alternatively ruled, the award of the attorney's fees against the State of Connecticut in this action was permissible as an "ancillary effect" under *Edelman v. Jordan*, 415 U.S. 651 (1974), and therefore not barred by the Eleventh Amendment.

The similarities between *Maher*, *supra*, and this action are many. Both concern the relationship between 42 U.S.C. §1983 and the Social Security Act, §602(a)(7). In each case, the lower court found that a violation of the Social Security Act constitutes a violation of 42 U.S.C. §1983. Moreover, the instant case presents the relevant issues in a posture more appropriate for review than *Maher*. Unlike *Maher*, the decision below is clear as to the existence of a prevailing party and the constitutional claim in the present case has been found to be not of constitutional dimension. We respectfully submit that, overall, both cases involve similar legal and factual issues and therefore joint review is warranted.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the

judgment and opinion of the Supreme Judicial Court of the State of Maine.

Respectfully submitted,

John M.R. Paterson
Deputy Attorney General
State of Maine
State House
Augusta, Maine 04333

James Eastman Smith
Assistant Attorney General
State of Maine
State House
Augusta, Maine 04333

Counsel for Petitioners

APPENDIX A

Joline THIBOUTOT et al.

v.

STATE of Maine et al.

Supreme Judicial Court of Maine

Aug. 31, 1979.

Sewall & Mittel by Robert E. Mittel (orally), Portland, for plaintiffs.

James E. Smith, Asst. Atty. Gen. (orally), Augusta, for defendants.

Before McKUSICK, C.J., and POMEROY, WERNICK, DELAHANTY, GODFREY and NICHOLS, JJ.

GODFREY, Justice.

The family of Lionel and Joline Thiboutot included eight children: four by both Lionel and Joline, one by Joline but not Lionel, and three by Lionel but not Joline. In November, 1975, Lionel Thiboutot was notified by the Maine Department of Human Services of a reduction in AFDC benefits which the Department deemed required by a change of federal regulations. The change was essentially as follows: In computing

the available income of Lionel in order to determine the amount of AFDC benefits allowed for Lionel's three children of whom Joline was not the mother, the Department would no longer subtract that portion of Lionel's income which went to the support of the four children of both Lionel and Joline (those children not being eligible for AFDC benefits), although Lionel was required by law to support those children and in fact did support them.

The Thiboutots pursued their administrative remedies in an effort to get the Department to revise its ruling. A final adverse decision was rendered by the Commissioner on March 18, 1976. From that decision the Thiboutots filed a timely appeal under Rule 80B, M.R. Civ.P., alleging that the Commissioner's decision was in violation of state and federal welfare statutes. Both the State of Maine and David Smith, as Commissioner of the Maine Department of Human Services, were named as defendants.

On January 7, 1977, an amended complaint was filed seeking class relief as well as relief for the Thiboutots. The amended complaint, brought pursuant to 42 U.S.C. §1983 as well as Rule 80B, alleged violation of the Social Security Act, 42 U.S.C. §602(a)(7), and pertinent federal regulations. A motion for class action certification was filed on February 16, 1977, and granted on June 28, 1977.

A motion for a separate trial on the issue of liability was granted on June 17, 1977. On July 15, 1977, judgment was entered for the Thiboutots on the merits. Defendants were enjoined from enforcing the challenged regulation and ordered to adopt new regulations, notify all members of the Thiboutots' class of the new regulations, and pay benefits prospectively to eligible persons in the class. The trial court reserved decision on retroactivity of relief and on the right to an award of attorney's fees.

Defendants complied with the order. On February 27, 1978, final judgment was entered ordering retroactive benefits for the Thiboutots but denying plaintiffs' motions for retroactive benefits for the class and for attorney's fees. From this judgment plaintiffs appeal. The defendants have not cross-appealed. We sustain plaintiffs' appeal on the issue of attorney's fees.

I. Retroactive Benefits

[1] The appellant seeks to have the defendant State of Maine adjudicated liable to pay money to the members of the class in the form of retroactive AFDC benefits. The sovereign immunity of the State of Maine precludes such a judgment unless the state has given its consent to be sued. *Drake v. Smith*, Me., 390 A2d 541 (1978).

The Maine Legislature has not enacted any law manifesting consent that the state be subject to suit for retroactive AFDC benefits. Section 3741 of title 22 (Supp. 1965-78) provides only as follows:

> "The department is authorized to administer and operate a program of aid to dependent children within the Federal Social Security Act and any amendments and additions thereto."

Drake v. Smith, supra, makes clear that the Legislature's authorization of the state's participation with the federal government in a cooperative welfare program, such as aid to families with dependent children, does not itself constitute an implied waiver of sovereign immunity. *Id. at* 545.

[2] Appellant contends, however, that waiver of the state's sovereign immunity may be found in the promulgation of certain regulations by the Department of Human Services which, in appellant's view, mandate the payment of retroactive AFDC benefits to the class. We disagree with appellant's interpretation of those regulations.

Appellant relies on the following provision of the Maine Public Assistance Payments Manual (MPAPM):

> "If the agency's original action

> is reversed or in any other way modified causing a decision favorable to the claimant, the agency will take immediate steps to insure that within the 60 day period that corrected payments are made retroactively to the date the incorrect action was taken or to the date of application, whichever was later." Maine Public Assistance Payments Manual (MPAPM) ch. I., sec. C, p.7 (Dec., 1978 Revision).[1]

The regulations contain nothing to suggest that "the claimant" includes other recipients of aid who are in a position similar to that of the claimant but have not made application for review by means of the available administrative and judicial remedies. In the first place, the provision relied on calls for retroactive payments only from the date of claimant's application if that date is later than the date of the incorrect action. Such a provision is not consistent with a purpose of affording full restitutionary relief for correction of the administrative error.

Furthermore, the context of the quoted language indicates that only persons who seek administrative and judicial review of the reduction in AFDC benefits--in this case the

1. The quoted provision was in effect at the time the present action was brought.

Thiboutots themselves--may be considered "claimants". On page 1 of Chapter I, Section C, the regulations state:

> "Federal and State law assure that any claimant, or anyone acting responsibly in his behalf, who believes that proper consideration has not been given to all circumstances surrounding his claim for assistance may request a fair hearing."

The regulations then detail the procedure by which administrative review of an adverse decision by the Department may be obtained. On page 4 of Chapter I, Section C, the regulations continue:

> "The State agency may respond to a series of individual requests for fair hearings by conducting a single group hearing. . . . In all group hearings, whether initiated by the agency or by the claimants, the policies governing fair hearings will be followed."

Here the term "claimants" is used to refer to those individuals who have requested hearings. Moreover, at the time the present action was brought, the paragraph immediately preceding the language appellants rely on provided as follows:

> "Within 5 days of the decision, a letter will be sent over the Commissioner's signature, advising the

> claimant of the fair hearing decision and of his right to judicial review under the Maine Rules of Civil Procedure [*sic*] Rule 80B, if he is dissatisfied with the decision. The letter will advise the claimant that if he wishes to take advantage of this right, he must file a petition for review with the Superior Court within 30 days of the receipt of the decision with which he is dissatisfied.[2]

Again "claimant" is used to mean an individual who has actually sought administrative review of an agency decision.

2. This paragraph was revised in December of 1978 and presently states:

> "Within five days of the decision by the Hearing Officer the copy of the decision, its basis (as dirscribed previously) and of the claimant's rights to judicial review under Maine Rules of Civil Procedures [sic] Rule 80B if dissatisfied will be mailed to the claimant. The notice will also advise the claimant that if he wishes to take advantage of this right, he must file a petition for review with the Superior Court within 30 days of the receipt of the decision with which he is dissatisfied." [sic]

We conclude that the regulations did not call for the payment of retroactive AFDC benefits to the unnamed members of the class in the present action. The judgment of the Superior Court, awarding retroactive AFDC benefits to the Thiboutots but not to the members of the class, is thus consistent with our interpretation of the departmental regulations, namely, that they require limited retroactive payments only to those who have been "claimants" actually pursuing their rights under the regulations. The promulgation of those regulations cannot be regarded as amounting to a waiver of sovereign immunity for purposes of appellants' action to recover retroactive benefits for all persons in their class.

[3] Appellants contend that the state may not assert sovereign immunity as a bar to their class action because each member of the class had a property right in correct AFDC payments and thus their property was taken by the state without just compensation. They cite *Foss v. Maine Turnpike Auth.*, Me., 309 A.2d 339 (1973), for the proposition that sovereign immunity is not available to the state to bar a citizen's claim for just compensation arising from a violation of the just-compensation clauses of the federal and state constitutions. U.S.Const. amend. V per amend. XIV; Me.Const. art. I, §21.

[4] Despite occasional suggestions

that the right to welfare aid should be regarded as a property right, as distinguished from a mere gratuity, e.g., *Goldberg v. Kelly*, 397 U.S. 254, 262 n. 8, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970),[3] not all the rights normally associated with ownership of property are available to recipients under the welfare laws and regulations. For example, the federal welfare regulations themselves impose limits on the extent to which state plans may provide for retroactive corrective payments. Thus the federal requirement that a state plan provide for prompt correction of underpayments is in terms conditioned on the existence in the plan of a provision for recoupment of overpayments. 45 C.F.R. §233.20(a)(12)(ii). Moreover, in such a state plan, "retroactive corrective payments shall be made only for the 12 months preceding the month in which the underpayment is discovered,"[4]

3. Citing C. Reich, Individual Rights and Social Welfare: The Emerging Legal Issues, 74 Yale L.J. 1245, 1255 (1965). See also H. Jones The Rule of Law and the Welfare State, 58 Colum.L.Rev. 143, 154-55 (1958), and see generally C.Reich, The New Property, 73 Yale L.J. 733 (1964).

4. Applied literally in the instant case, this regulation would lead to the absurd result that because plaintiffs discovered the underpayment promptly they could recover little or nothing.

45 C.F.R. §233.20(a)(12)(ii)(a), and "no retroactive payment need be made where the administrative cost would exceed the amount of the payment," 45 C.F.R. § 233.20(a)(12)(ii)(c).

If the right to correct payments of welfare aid were a property right like the right to payments under an annuity contract or the right to rent under a lease, the correction of underpayments could not be curtailed in such a manner. In view of the qualified nature of welfare rights, cases denying the defense of state immunity where plaintiff's property has been taken by the state without just compensation cannot be relied on as precedents controlling the disposition of a class claim for retrospective welfare benefits.

[5] The state did not appeal the award of retroactive benefits to the Thiboutots. We reject appellant's suggestion that the state's failure to appeal from the judgment for the Thiboutots constitutes a waiver of sovereign immunity in the class action. The judgment of the trial court afforded exactly the relief contemplated by the departmental regulations.

[6] The complaint in the present action was amended to include a cause

of action under 42 U.S.C. §1983[5] on the basis that defendants were "persons" who had deprived plaintiffs of their rights "secured by the Constitution and laws" by violating 42 U.S.C. §602(a)(7) (a provision of the federal Social Security Act setting forth the basic requirements for state AFDC programs) and 45 C.F.R. §233.20(a)(3)(ii)(D), a federal welfare regulation defining available income and resources of recipients. In his judgment, the trial justice found that the defendants were violating 42 U.S.C. § 602 (a)(7) and the cited welfare regulation but made no finding with respect to violation of 42 U.S.C. §1983. Appellants contend that the rights defendants deprived them of under color of state regulation were rights "secured by the Constitution and laws" and hence within the ambit of section 1983.

Arguing that the federal courts have

5. Section 1983 provides as follows:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

exclusive jurisdiction to hear actions under section 1983, appellees assert that the Superior Court had no jurisdiction to hear and determine appellants' section 1983 claim. However, the better considered cases hold that federal and state courts have concurrent jurisdiction to entertain such actions. *E.g., Brown v. Pitchess*, 13 Cal.3d 518, 119 Cal.Rptr. 204, 531 P.2d 772 (1975); *Terry v. Kolski*, 78 Wis.2d 475, 254 N.W.2d 704 (1977). *Contra, Chamberlain v. Brown*, 223 Tenn. 25, 442 S.W.2d 248 (1969). Adjudicating federal claims against state governments in the state courts is likely to produce less friction in federal-state relations and is consistent with the concept of federalism expounded in *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971). The Superior Court had jurisdiction to entertain a claim under section 1983.

[7] Contrary to another argument made by the appellees, the fact that the trial justice made no finding or mention of a violation of section 1983 in his order and judgment is not in itself conclusive against appellees' liability under that section. *See Hagans v. Lavine*, 415 U.S. 528, 94 S.Ct. 1372, 39 L.Ed.2d 577 (1974); *Seals v. Quarterly County Court*, 562 F.2d 390(6th Cir. 1977). The 1983 claim was properly raised before the trial court and cannot be disregarded by the Law Court on appeal merely because the judgment of the trial court made no mention of it.

[8] Whether the appellees' violation of the federal social security law and regulations, with resulting incorrect reduction of AFDC benefits to appellants, constitutes a violation of section 1983 is by no means clear. It had been assumed in a succession of cases in the Supreme Court that section 1983 afforded an appropriate remedy for violation of rights under the federal welfare laws. *See Rosado v. Wyman*, 397 U.S. 397, 90 S.Ct. 1207, 25 L.Ed.2d 442 (1970), and other cases cited by Stewart, J., dissenting in *Chapman v. Houston Welfare Rights Organization*, _____U.S._____, _____, 99 S.Ct. 1905, 1944-45, 60 _____L.Ed.2d 508, 557-58 (1979). However, the *Chapman* case itself brought to the surface serious differences of opinion within the Court over whether section 1983 encompasses a deprivation of rights arising solely out of the Social Security Act. *Chapman* did not resolve the issue, holding only that federal district courts have no jurisdiction under subsection (3) and (4) of 28 U.S.C. §1343 to entertain a claim under section 1983 that a state welfare regulation is invalid merely because it conflicts with the Social Security Act. From the several opinions in *Chapman*, it appears that four members of the Court think section 1983 is available for relief in such a case and three think it is not. Two Justices, members of the majority, expressed no opinion on the scope of section 1983.

With some hesitancy in view of the close division in *Chapman*, we conclude that section 1983 afforded appellants a remedy in the Superior Court for deprivation of rights under the Social Security Act even though those rights were not of constitutional dimension. Until the Supreme Court has spoken definitely to the contrary, we think it would be incorrect to ignore the long line of federal cases in which section 1983 has been treated without question as a proper vehicle for such relief. Nevertheless, appellants' claim for retroactive benefits for the class is barred by the sovereign immunity of the State of Maine.

In *Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed. 2d 662 (1974), the Supreme Court held that the immunity of the states under the Eleventh Amendment[6] bars recovery in a federal district court of retrospective welfare benefits erroneously denied by state officials before entry of the federal court's order determining the wrongful-

6. U.S.Const. amend. XI, provides as follows:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

ness of their action. The Court distinquished *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), which had held that a federal court could without violating the Eleventh Amendment, enjoin state officials to conform their future conduct to the requirements of federal law even though the injunction might have some fiscal impact on the state. The Court based the distinction on the difference between prospective and retrospective relief, the latter being perceived as having potential for more drastic impact on state treasuries.

Although the rationale of *Edelman* seemed to be placed in some doubt by the decision in *Monell v. Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), holding municipalities to be "persons" subject to 1983 actions for both prospective and retroactive relief in federal courts,[7] a recent decision, *Quern v. Jordan*, _____ U.S._____, 99 S.Ct. 1139, 59 L.Ed.2d 358 (1979), has reaffirmed *Edelman*, interpreting it as holding that Congress did not intend to abrogate the states' sovereign immunity when it enacted sec-

7. Monell overruled Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961), which had held that a municipality was not a "person" within the meaning of section 1983.

tion 1 of Civil Rights Act of 1871, the precursor of section 1983. In the course of his opinion expressing the view of a majority of the Court, Mr. Justice Rehnquist said:

> "Given the importance of the States' traditional sovereign immunity, if in fact the Members of the 42d Congress believed that § 1 of the 1871 Act overrode that immunity, surely there would have been lengthy debate on this point and it would have been paraded out by the opponents of the Act along with the other evils that they thought would result from the Act. Instead, § 1 passed with only limited debate and not one Member of Congress mentioned the Eleventh Amendment or the direct financial consequences to the States of enacting § 1. We can only conclude that this silence on the matter is itself a significant indication of the legislative intent of § 1." ____U.S. at _____, 99 S.Ct. at 1146, 59 L.Ed.2d at 368.

See also *Alabama v. Pugh*, 438 U.S. 781, 98 S.Ct. 3057, 57 L.Ed.2d 1114 (1978). The majority of the Justices in *Quern v. Jordan* reached their decision by interpreting the word "person" in section 1983 as excluding the states because of their sovereign immunity. Justices Brennan and Marshall, concurring in the result, observed that the actual decision did not require such a rationale and objected

to it. We consider the issue to be still not definitively resolved by the Supreme Court.

Appellants in the instant case contend that *Edelman* and other federal decisions according immunity to the states in 1983 actions brought in federal court for retrospective damages are not applicable in a state court, where the Eleventh Amendment creates no problem. However, a theme running pervasively through the federal decisions is that unless a state has consented to being sued for restrospective welfare benefits mistakenly withheld, it should be immune to section 1983 actions for their recovery. The liability for such benefits is peculiar: First, unlike liability in tort, liability for such benefits to a class does not typically arise from wilful or even negligent wrongdoing; underpayment of welfare benefits to a class is more likely to result from good-faith misinterpretation of the complex federal regulations under which welfare programs must be administered. Second, the financial burden on the state treasury to meet retrospective payments of welfare benefits may become great if a large class of welfare recipients has been affected for a long time. The many pressing needs for welfare assistance and the practical difficulty some states encounter in raising matching funds to meet them adequately suggest caution about compelling state welfare officials to assign priority, in effect, to correcting past underpayments, which can amount

to large sums, ahead of current and perhaps more critical needs.[8] The limitations, referred to earlier in this opinion, contained in the social security regulations themselves suggest strongly that correction of past underpayments is not regarded by welfare officials as a matter of highest priority in the administration of the AFDC program.

8. See Rothstein v. Wyman, 467 F.2d 226 (2d Cir. 1972), cert. denied, 411 U.S. 921, 93 S.Ct. 1552, 36 L. Ed.2d 315. But of, Jiminez v. Weinberger, 523 F.2d 689 (7th Cir. 1975, cert. denied sub nom. Mathews v. Jimenez, 427 U.S. 912, 96 S.Ct. 3200, 49 L.Ed.2d 1204 (1976)(retroactive class relief permitted against the Secretary of Health, Education and Welfare where disability insurance benefits had been denied under an unconstitutional federal statutory classification). In Jiminez, a case strongly relied on by appellants, no question of state sovereign immunity was involved. The United States was deemed to have waived its sovereign immunity by enacting 42 U.S.C. §404, providing for overpayments and underpayments of federal old-age, survivors, and disability insurance benefits. The court noted the difference between ordering a state to make payments of improperly withheld welfare benefits and ordering the Secretary to pay retroactive benefits out of the Federal Disability Trust Fund (42 U.S.C. §401(b)) to which plaintiffs had contributed through taxation.

[9] Though the question is not free from doubt, it is our conclusion that, in the absence of waiver by the state of its sovereign immunity, the state may constitutionally interpose that immunity as a bar to a class action brought in a state court under 42 U.S.C. §1983 to recover the amount of past AFDC underpayments, at least where there is no allegation or evidence that the underpayments were made in bad faith for a racially discriminatory or other constitutionally impermissible purpose. Our reliance on *Edelman* and *Quern* accords with the rationale adopted by the Supreme Court of Washington in denying section 1983 relief in *Edgar v. State*,[9] 92 Wash.2d 217, 595 P.2d 534 (1979).

It is our conclusion also that the State of Maine has not waived its immunity from such a class action and has effectively asserted it to bar the class action for retroactive benefits under section 1983 in this case. We are led to this conclusion by the rationale of our decision in *Drake v. Smith*, Me., 390 A.2d 541 (1978), fortified by the con-

9. The circumstances of the Edgar case were entirely different from those of the instant case. However, Edgar's claim was one for money damages against the state under section 1983.

siderations referred to above that have prompted the federal courts to accord the states an immunity under the Eleventh Amendment from similar actions.

II. Attorney's Fees

Appellants contend that they are entitled to attorney's fees under 42 U.S.C. §1988, as amended by the Civil Rights Attorney's Fees Awards Act of 1976, P.L. 94-559 §2, 90 Stat. 2641. The last sentence of section 1988 now provides:

> "In any action or proceeding to enforce a provision of [certain civil rights legislation, including 42 U.S.C. §1983] the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

Appellants assume that P.L. 94-559 is applicable to the state courts and that the Superior Court in this case denied their motion for the award of attorney's fees in the exercise of its discretion. They insist that the legislative history of P.L. 94-559 indicates Congressional intent to restrict the judicial discretion to deny fees when a section 1983 action has been successful. Appellants' position is that only in exceptional cases are fees to be denied to a prevailing plaintiff in a section 1983 action. They rely partly on the Senate Report accompanying P.L. 94-559, which contains the following comment:

> "A party seeking to enforce the rights protected by the statutes covered by S. 2278, if successful, 'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.' *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402, 88 S.Ct. 964, 19 L.Ed.2d 1263 (1968)." S.Rep. No. 94-1011, 94th Cong., 2d Sess. (1976), reprinted in [1976] U.S. Code Cong. & Admin. News, pp. 5908, 5912.

[10] Except for some kinds of tortious conduct, the Maine state courts have no authority to include attorney's fees as part of costs in the absence of statutory authorization or agreement of the parties. The Social Security Act itself contains no such authorization applicable to the violation of 42 U.S.C. §602(a)(7) that occurred here. If appellants have any right to attorney's fees, that right must come from the provisions of section 1988 on the basis that they have "prevailed" to some extent in their section 1983 action.

Even though appellants are barred by state immunity from recovering retrospective benefits in their class action, they have prevailed on a claim cognizable under section 1983. Both in its judgment entered July 15, 1977, and in its final judgment, the Superior Court give plaintiffs prospective relief in the form of enjoining the defendants from enforcing

the erroneous policy set forth in the departmental regulations and ordering them to amend the Maine Public Assistance Payments Manual. In its judgment of July 15, 1977, the court required defendants to certify that all members of plaintiffs' class had been notified of the regulations and were receiving benefits accordingly.

[11, 12] The trial court did not indicate whether it thought it was granting such prospective relief in response to plaintiffs' Rule 80B appeal or to the section 1983 count of the amended complaint. Although prospective relief was available through the 80B appeal alone, it was also available through section 1983 with the result that if the Civil Rights Attorney's Fees Awards Act is applicable to the state courts, the trial justice had discretion to award attorney's fees as part of plaintiff's costs. *See Hagans v. Lavine*, 415 U.S. 528, 94 S.Ct. 1372, 39 L.Ed.2d 577 (1974); *Seals v. Quarterly County Court*, 562 F.2d 390 (6th Cir. 1977). It was held in the *Seals* case that the presence of a substantial constitutional claim under section 1983 justified the allowance of attorney's fees even though the relief was granted exclusively on alternative state grounds.

Nothing in the language of P.L. 94-559 indicates whether it is intended to be binding on the state courts, and the Senate and House reports concerning the

measure shed no light on that question.[10] Before the amendment of 1976, the provisions of section 1988 related in terms exclusively to actions in the federal courts.[11] Congress enacted the amendment in response to the Supreme Court's decision in *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975), holding that it was error for a federal court to award attorney's fees as an element of costs in an environmental suit in equity: federal courts may not ordinarily include attorney's fees in costs without statutory authority. The

10. For what it may be worth, in commenting on the bill that became P.L. 94-559, Representative Drinan said that the measure "would authorize State and Federal Courts to award counsel fees in actions brought under specified sections of the United States Code relating to civil and constitutional rights." 122 Cong. Rec., No. 151--Pt. II, H 12158 at 12159 (daily ed. Oct. 1, 1976)(remarks of Rep. Drinan).

11. But see Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 239-40, 90 S.Ct. 400, 24 L.Ed.2d 386 (1969) where the Court used language which seemed from context to imply that section 1988 (before its amendment in 1976) established a rule of damages applicable in a state court in an action under 42 U.S.C. §1982.

genesis of the amendment was thus a case litigated in the federal court system, and the Senate and House reports address the question only in the context of federal litigation.

Although it seems extraordinary that Congress would enact a statute affecting the authority of the states to control costs in their own courts without stating explicitly its intention to do so, there can be little doubt that Congress has the constitutional power to enact a statute requiring the states to pay court costs in their own courts if its finds such a measure necessary to enforce the provisions of the Fourteenth Amendment. See U.S.Const. amend. XIV §5; *Hutto v. Finney*, 437 U.S. 678, 98 S.Ct. 2565, 57 L.Ed.2d 522 (1978). The solecism, if it be one, of requiring the states to pay attorney's fees as part of costs in their own courts is not much greater than that of requiring them to do so in the federal courts, and *Hutto v. Finney, supra*, makes it clear that the Eleventh Amendment is no bar there to recovering attorney's fees against the states under section 1988. In *Hutto*, most of the Court thought that, unlike liability for retroactive damage claims, liability for attorney's fees poses no serious threat to state treasuries.

The argument in favor of construing the Civil Rights Attorney's Fees Awards Act to apply to the state courts is derived from the main purpose of the Act: namely, to encourage private citizens to take action, which they might not otherwise take, as "private attorneys general" to enforce civil rights laws. That purpose ought to be carried out uniformly, it is said, in state courts as well as federal. The supreme courts of Alaska and Wyoming have apparently taken this view of the act, treating it as applicable to their own state courts. *Tobeluk v. Lind*, Alaska, 589 P.2d 873 (1979)(upholding a discretionary denial of fees under §1988); *Board of Trustees v. Holso*, Wyo., 584 P.2d 1009 (1978) (upholding, in part, a discretionary award of fees under §1988). In each case, the court assumed without discussion the applicability of the statute to state courts. The question of applicability was explicitly considered and resolved affirmatively by the New York Supreme Court, Appellate Division, Fourth Department, in *Young v. Toia*, 66 A.D.2d 377, 413 N.Y.S.2d 530 (1979). Furthermore, in a companion case, the same New York court imported into section 1988 the limitation on the trial court's discretion that the federal courts must observe under *Newman v. Piggie Park Enterprises*, 390 U.S. 400, 88 S.Ct. 964, 19 L.Ed.2d 1263 (1968) and *Northcross v. Board of Education*, 412 U.S. 427, 93 S.Ct. 2201,37 L.Ed.2d 48 (1973). *Ashley v. Curtis*, 67 A.D.2d 828, 413 N.Y.S.2d 528 (1979).

The desirability of uniform remedies throughout the nation in civil rights

actions and the unanimity of such authority on the point as so far exists persuade us that the Civil Rights Attorney's Fees Awards Act of 1976 should be applied in the state courts of Maine.

As the instant case is presented to us on appeal we cannot tell why the trial justice denied an attorney's fee as part of costs, for he stated no reasons for the denial. Appellants have treated the denial as an erroneous exercise of discretion under section 1988, but we have no way of knowing whether the trial justice denied them because he thought section 1988 inapplicable or because he had exercised his discretion under section 1988 and found the allowance of attorney's fees to be inappropriate for reasons he thought sufficient. If the latter was the case, we do not know what standard he applied in considering the question.

We must therefore remand the case for reconsideration of the question of attorney's fees. Under 42 U.S.C. §1988, the trial justice must, on remand, first exercise his discretion to determine whether plaintiffs are entitled to any award of fees. In this case, the standard for making that determination is not so nearly absolute in application as appellants suggest that it must be. Both the *Newman* and *Northcross* cases, *supra*, involved racial discrimination. In *Newman* the Supreme Court held that one who succeeds in obtaining an injunction under Title II of the Civil Rights Act of 1964 "should ordinarily recover an

attorney's fee [under section 204(b) of that act] unless special circumstances would render such an award unjust." 390 U.S. at 402, 88 S.Ct. at 966. In *Northcross*, plaintiffs had prevailed in litigation aimed at desegregating the public schools of Memphis. In its judgment, the Court of Appeals for the Sixth Circuit had denied attorneys' fees without stating a reason. The Supreme Court vacated the judgment insofar as it related to denial of costs and attorneys' fees and remanded to the Court of Appeals for reconsideration in the light of the *Newman* standard.

[13] We think the *Newman-Northcross* standard invites far more balancing of competing considerations than appellants seem to suggest,[12] and that all aspects of the case may be properly taken into

12. See, e.g. Zarcone v. Perry, 581 F.2d 1039 (2d Cir. 1978), cert. denied, ____U.S.____, 99 S.Ct. 843, 59 L.Ed.2d 38.
As Mr. Justice Powell observed, concurring in part and dissenting in part in Hutto v. Finney, 437 U.S. 678, 683, 98 S.Ct. 2565, 2584 n.7, 57 L.Ed.2d 522, 546 n.7 (1978), there is nothing in the Civil Rights Attorney's Fees Awards Act that requires the "routine imposition of counsel-fee liability on anyone." He cited the House Report to P.L. 94-559 where the following passage may be found:
"2. Judicial Discretion
The second key feature of the bill is its mandate that fees are only to be allowed

account by the trial justice in the exercise of his discretion. The fact cannot be overlooked that appellants' litigation has led to the correction of an erroneous state welfare rule with resulting long-term benefit to an indeterminate class of present and future AFDC recipients. The public has an important stake in the correct application of welfare funds, and the public interest has thus been served in some measure by this litigation. The *Newman-Northcross* standard thus provides a suitable starting point for the trial court's reconsideration of the award or denial of attorney's fees.

If the trial court decides on remand that an attorney's fee should be awarded, it may properly take into account any pert-

12. (Con't)
in the discretion of the court. Congress has passed many statutes requiring that fees be awarded to a prevailing party. Again the Committee adopted a more moderate approach here by leaving the matter to the discretion of the judge, guided of course by the case law interpreting similar attorney's fee provisions. This approach was supported by the Justice Department on Dec. 31, 1975. The Committee intends that, at a minimum, existing judicial standards, to which ample reference is made in this report, should guide the courts in construing H.R. 15460." H.R.Rep. No.94-1558, 94th Cong. 2d Sess. (1976).

inent factors discussed in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19(5th Cir. 1974).

Because of the possibility that review by this Court of the trial court's ultimate decision may become necessary, the record should reflect the considerations on which the trial justice bases his decision.

The entry is:

Appeal sustained.

Judgment vacated insofar as it relates to denial of attorney's fees as part of costs.

Remanded to Superior Court for reconsideration of costs in the light of the opinion herein.

ARCHIBALD, J., did not sit.

APPENDIX B

STATE OF MAINE SAGADAHOC, ss	SUPERIOR COURT CIVIL ACTION Docket No. CA 76-33

JOLINE THIBOUTOT and LIONEL THIBOUTOT,

Plaintiffs

vs.

STATE OF MAINE, et al

Defendants

Final Judgment

Pursuant to the Order of July 14, 1977, the parties having been heard through counsel orally and by briefs, it is ORDERED, ADJUDGED and DECREED:

1. This Final Judgment shall be applicable to Plaintiffs' class which is composed of families in which

(a) Each of the two adults have child(ren) living with them which are stepchildren of the other spouse;

(b) At least one of the two adults has earned income;

(c) There are mutual children of both adults living with them;

(d) Because of the Defendants' policy set forth in Maine Public Assistance Payments Manual, Appendix C, all of the income which is spent to support the mutual children and which is not available to the remaining children is nevertheless treated as available to those other remaining children (the stepchildren).

2. Defendants' policy, as set forth in the Maine Public Assistance Payments Manual, Chapter II, Section C, page 7 (first paragraph) and Appendix C, which requires families with stepchildren eligible for AFDC and mutual children ineligible for AFDC to treat as income available to the AFDC eligible stepchildren, income that is actually unavailable to them because their parents have a legal obligation under State law to use a portion of that income to support the mutual children, is in violation of 42 USC §602a(7); 45 CFR §233.20(a)(3)(ii)(D) and Maine Public Assistance Payments Manual, Chapter II, Section C, p. 1.

3. Defendants are permanently enjoined from enforcing the above policy and are ordered to amend Maine Public Assistance Payments Manual, Chapter II, Section C, page 7, (first paragraph) and Appendix C, by adopting in their place new regulations not later than sixty (60) days from the date of the entry of this judgment.

4. Plaintiffs Thiboutot are entitled to retroactive benefits.

5. Plaintiffs' motion for retroactive benefits to each member of Plaintiff's class is hereby denied.

6. Plaintiffs' motion for attorney's fees is hereby denied.

7. Plaintiffs' motion for costs is hereby granted in an amount to be agreed upon between counsel, or, if counsel are unable to agree, in an amount to be determined by the Court after further hearing.

Dated at Bath, Maine

this 23rd day of February, 1978.

/s/ Louis Scolnik
Justice, Superior Court

A TRUE COPY

ATTEST: /s/ Margaret D. Taber
Clerk - Deputy Clerk
Superior Court

STATE OF MAINE
Sagadahoc, ss Clerk's Office

FEB 27, 1978

Received and Filed

Supreme Court, U. S.
FILED
MAR 6 1980
MICHAEL RODAK, JR., CLERK

APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-838

STATE OF MAINE AND MICHAEL R. PETIT,
Commissioner of the Department of
Human Services, State of Maine,
Petitioners,

v.

JOLINE THIBOUTOT AND LIONEL THIBOUTOT
and on Behalf of Others
Similarly Situated,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT
OF MAINE

PETITION FOR CERTIORARI FILED NOVEMBER 29, 1979
CERTIORARI GRANTED JANUARY 21, 1980

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STATE OF MAINE
SAGADAHOC, ss

SUPERIOR COURT
Civil Action
Docket No. CA-76-33

JOLINE and LIONEL THIBOUTOT
Robert Mittel, Esq.
178 Middle Street
Portland, Maine 04111

Plaintiffs

vs.

STATE OF MAINE and
DAVID SMITH
James E. Smith, Esq.
Assistant Attorney General
State House, Augusta, Maine

Defendants

COMPLAINT TO REVERSE
DECISION OF HEALTH & WELFARE DEPT.

April 16, 1976

Complaint filed by Robert Mittel, Esq.

January 7, 1977

Amended complaint filed by Robert Mittel, Esq.

March 2, 1977

Answer filed by James E. Smith, Esq.

March 3, 1977

Stipulation of Fact filed by Robert E. Mittel, Esq., and James E. Smith, Esq.

March 10, 1977

Plaintiff's first Interrogatories to defendant's filed by Robert Edmond Mittel, Esq.

April 6, 1977

Defendants answers to first interrogatories filed.

June 17, 1977

Stipulation for the entry of a Class certification Order filed. ORDER: Plaintiffs Motion for Class Certification is hereby granted. The class is defined as set forth out in that Motion.

/s/ Harold J. Rubin,
Justice, Superior Court.

June 17, 1977

Motion for separate trial filed. Motion granted as prayed for. Harold J. Rubin, JSC.

June 20, 1977

Class Certification Order: ORDERED that plaintiffs' Motion for Class certification of February 15, is granted. The class so certified is defined as follows: Families in which: (a) each of the two adults has child(ren) living with them which are stepchildren of the other spouse; (b) at least one of the adults has earned income; (c) there are mutual children of both adults living with them; (d) because of Defendant's policy as set forth by Maine Public Assistance Payments Manual, Appendix C, pages 1 and 2, all of the income which is spent to support the mutual children and which is not available to support the remaining children is nevertheless treated as available to those other remaining children.

July 15, 1977

ORDER AND JUDGMENT: Having reviewed the record and briefs and having heard argument of counsel, it is hereby Ordered, Adjudged and Decreed:

1. This Judgment shall be applicable to Plaintiffs class which is composed of families in which

(a) Each of the two adults have child(ren) living with them which are stepchildren of the other spouse;

(b) At least one of the two adults has earned income;

(c) There are mutual children of both adults living with them;

(d) Because of the Defendant's policy set forth in Maine Public Assistance Payments Manual, Appendix C all of the income which is spent to support the mutual children and which is not available to the remaining children is nevertheless treated as available to those other remaining children (the stepchildren).

2. Defendant's policy, as set forth in the Maine Public Assistance Payments Manual, Chapter II, Section C, page 7 (first paragraph and Appendix C, which requires families with stepchildren eligible for AFDC and mutual children ineligible for AFDC to treat as income available to the AFDC eligible stepchildren income that is actually unavailable to them because their parents have a legal obligation under State law to use a portion of that income to support the mutual children, is in violation of 42 USC Section 602a (7); 45 CFR Section 233.20(a) (3) (ii) (D) and Maine Public Assistance Payments Manual, Chap. II, Sec. C., p. 1.

3. Defendants are permanently enjoined from enforcing the above policy and are ordered to amend Maine Public Assistance Payments Manual, Chapter II, Section C., Page 7, (First paragraph) and Appendix C, by adopting in their place new regulations not later than sixty (60) days from the date of the entry of this Judgment.

4. Within 90 days from the entry of this Judgment defendant shall certify to this Court that the new regulations required by Paragraph 3 have been adopted, that all members of plaintiffs' class have been notified of the new regulations and are receiving benefits in accordance with those new regulations.

5. The hearing decision of March 26th, 1976 in the case of Lionel and Joline Thiboutot is reversed and that case is remanded to the defendants for a new hearing at which time plain-

tiffs' entitlement for AFDC is to be determined pursuant to the regulations adopted pursuant to Paragraph 3.

6. There being more than one claim for relief before the Court and the Court having determined that there is no just reason for delay, this Judgment is to be entered as a final Judgment forthwith, pursuant to M.R.Civ.P. 54(b). The question of retroactive benefits is reserved for later hearing and the question of plaintiffs' entitlement to attorneys' fees is reserved for further hearing thereafter.

Dated: July 14, 1977 /s/ Harold J. Rubin,
Justice, Superior Court

August 24, 1977

Motion for Award of Retroactive Benefits and Attorneys Fees and Notice of Hearing filed by Robert E. Mittel, Esq.

September 22, 1977

Request for admissions and interrogatories filed by Robert Mittel, Esq.

October 7, 1977

Affidavit of Robert E. Mittel and Exhibits A & B filed.

October 17, 1977

Certification that the Order effective July 14, 1977 has been complied with filed by James Eastman Smith, Esq.

November 1, 1977

Answer to Interrogatories and admissions filed by James Eastman Smith, Esq.

February 15, 1978

ORDER: Argument of counsel having been heard and the record and briefs reviewed, it is hereby ORDERED, ADJUDGED AND DECREED that:

1. Plaintiffs Thiboutot are entitled to retroactive benefits.

2. Plaintiffs' Motion for retroactive benefits to each member of Plaintiff's class is hereby denied.

3. Plaintiff's motion for attorney's fees is hereby denied.

4. Plaintiff's motion for costs is hereby granted in an amount to be agreed upon between counsel, or, if counsel are unable to agree, in an amount to be determined by the Court after further hearing.

Dated at Bath, Maine
this 15th day of February, 1978 /s/ Louis Scolnik,
Justice, Superior Court

February 16, 1978

Judgment for the Plaintiff for retroactive benefits. Judgment for the plaintiff in regard to retroactive benefits to each member, and for attorneys fees denied. Judgment for costs to be agreed upon.

February 27, 1978

FINAL JUDGMENT: Pursuant to the Order of July 14, 1977, the parties having been heard through counsel orally and by briefs, it is ORDERED, ADJUDGED AND DECREED: 1. This final Judgment shall be applicable to Plaintiffs' class which is composed of families in which (a) each of the two adults have child(ren) living with them which are stepchildren of the other spouse; (b) at least one of the two adults has earned income; (c) there are mutual children of both adults living with them; (d) because of the Defendants' policy set forth in Maine Public Assistance Payments Manual, Appendix C, all of the income which is spent to support the mutual children is nevertheless treated as available to those other remaining children (the stepchildren). 2. Defendants' policy, as set forth in the Maine Public Assistance Payments Manual, Chapter II, Section C, Page 7 (First Paragraph) and Appendix C, which requires families with stepchildren eligible for AFDC and mutual children ineligible for AFDC to treat as income available to the AFDC eligible stepchildren, income that is actually unavailable to them because their parents have a legal obligation under State law to use a portion of that income to support the mutual children, is in vio-

lation of 42 USC Section 602a (7); 45 CFR Section 233.20(a) (3) (ii) (d) and Maine Public Assistance Payments Manual, Chapter II, Section C, p. 1. 3. Defendants are permanently enjoined from enforcing the above policy and are ordered to amend Maine Public Assistance Payments Manual, Chapter II, Section C, Page 7, (First Paragraph) and Appendix C, by adopting in their place new regulations not later than sixty (60) days from the date of the entry of this judgment. 4. Plaintiffs Thiboutot are entitled to retroactive benefits. 5. Plaintiff's motion for retroactive benefits to each member of Plaintiff's class is hereby denied. 6. Plaintiffs' motion for attorney's fees is hereby denied. 7. Plaintiffs' motion for costs is hereby granted in an amount agreed upon between counsel, or, if counsel are unable to agree, in an amount to be determined by the Court after further hearing.

Dated at Bath, Maine
this 23rd day of February 1978 /s/ Louis Scholnik,
Justice, Superior Court

Copies of Final Judgment mailed counsel.

February 27, 1978

Entry of Judgment: Defendants are to amend Maine Public Assistance Payments Manual. Plaintiffs are entitled to retroactive benefits and for costs. Attorneys fees denied.

March 13, 1978

Notice of Appeal filed by Robert Edmond Mittel, Esq.

April 11, 1978

"LAW"

STATE OF MAINE
SAGADAHOC, ss.

SUPERIOR COURT
Civil Action
Docket No.

JOLINE THIBOUTOT and LIONEL THIBOUTOT, of Topsham, in the County of Sagadahoc, State of Maine,

Plaintiffs

vs.

STATE OF MAINE and DAVID SMITH, in his capacity as Commissioner of the Maine Department of Human Services, and his successors in office,

Defendants

COMPLAINT

INTRODUCTION

1. This is an action in the nature of mandamus and certiorari pursuant to M.R. Civ. P. 80B to review a decision of the Commissioner of the Maine Department of Human Services (sometimes hereinafter referred to as the Department).

2. The Plaintiffs, Lionel and Joline Thiboutot, are husband and wife. There are eight children, all of whom live with them: three of those are children of Lionel Thiboutot's by a former marriage; four of those are children of Lionel and Joline Thiboutot and one of those is a child of Joline Thiboutot by a former marriage.

3. The only family income outside of the AFDC Grant at issue in this case is Lionel Thiboutot's earnings from the N. T. Fox Lumber Company, which, after deductions for tax and work-related expenses, equals Three Hundred and Sixty-Seven Dollars ($367) per month.

4. On March 18, 1976 the Plaintiffs received a decision of Defendant Smith which upheld an earlier decision to reduce their AFDC Grant.

5. The decision of Defendant Smith rejected the Plaintiffs' argument that Joline Thiboutot should receive an AFDC Grant of Sixty-Four Dollars ($64) for herself and her child by a former marriage and that Lionel should receive an AFDC Grant of Two Hundred Seventy-Eight Dollars ($278) for himself and his three (3) children by a former marriage.

6. The decision of the Commissioner to not allow any AFDC benefits for Lionel was based on the Commissioner's decision that Lionel's income was not to be reduced:

a) by the proportional amount of his income necessary to support his wife and their four mutual children, none of whom are eligible recipients for AFDC, and all of whom Lionel has a legal duty to support;

b) that Lionel, as a new applicant rather than a recipient still eligible (as of the date of the hearing) for AFDC, was not entitled to the "30 and 1/3" work incentive disregard.

7. Because the Commissioner did not allow Lionel any deductions from his income, his income exceeded the ratably reduced standard of need for himself and his three (3) children by a former marriage and the Commissioner therefore found him ineligible to receive AFDC benefits.

CLAIM FOR RELIEF

8. The decision of the Commissioner of March 18, 1976 is erroneous and constitutes a gross abuse of discretion because Lionel's income is computed on the basis of income which is not actually available. It is therefore in violation of applicable state and federal law: 45 C.F.R. § 233.20(a) (3) (ii) (D); Maine Public Assistance Payments Manual II, C. 1.

PRAYER

1. Reverse the decision of the Commissioner.

2. Issue a Declaratory Judgment invalidating the Commissioner's Policy of including income which a parent must, pursuant to state law, use to support persons not eligible to receive AFDC through the grant of such parent.

3. Grant such other relief as is necessary and proper.

Dated: April 14, 1976

/s/ Robert Edmond Mittel,
Attorney for Plaintiffs
178 Middle Street
Portland, Maine 04111

STATE OF MAINE SAGADAHOC, ss.	SUPERIOR COURT Civil Action Docket No. CA-76-33
JOLINE THIBOUTOT and LIONEL THIBOUTOT, of Topsham, County of Sagadahoc State of Maine, *Plaintiffs* vs. STATE OF MAINE and DAVID SMITH, in his capacity as Commissioner of the Maine Department of Human Services and his successors in office, *Defendants*	AMENDED COMPLAINT

INTRODUCTION

1. This is a civil action in which Plaintiffs seek, by way of mandamus and certiorari pursuant to M.R.Civ.P. 80B to review a decision of the Commissioner of the Maine Department of Human Services (hereafter the Department). Pursuant to the applicable provisions of the Social Security Act, 42 USC § 601, et seq, and its interpretative federal and state regulations and 42 USC § 1983, Plaintiffs also seek declaratory and injunctive relief. Plaintiffs have been wronged by Defendants' policy which requires families with stepchildren eligible for AFDC and mutual children ineligible for AFDC to treat as income available to the AFDC eligible stepchildren, income that is actually unavailable to them because their parents have a legal obligation under state law to use a portion of that income to support the mutual children.

PARTIES AND JURISDICTION

2. The jurisdiction of this Court is invoked under M.R.Civ. P. 80B and 14 MRSA §§ 5951 and 6051 by which Plaintiffs seek injunctive and declaratory relief.

3. The Plaintiffs, Lionel and Joline Thiboutot, are husband and wife. There are eight children in the family, all of whom live with them; three of those are children of Lionel Thiboutot; four of those are children of Lionel and Joline Thiboutot and one of those is a child of Joline Thiboutot.

4. Plaintiffs bring this action as a class action pursuant to M.R.Civ.P. 23. The members of the class are so numerous as to make joinder impractical and there are questions of fact and law common to the class; this is the type of action in which injunctive relief is the appropriate remedy for Defendants' conduct.

5. Plaintiffs' class is composed of families in which:

a) At least one of the two adults has child(ren) living with them which are stepchildren of the other spouse;

b) At least one of the two adults has earned income;

c) There are mutual children of both adults living with them;

d) Because of Defendant's policy set forth below in paragraph 10 all of the income which is spent to support the mutual children and which is not available to remaining children is nevertheless treated as available to those other children.

6. The only family income, outside of the AFDC grant at issue in this case, is Lionel Thiboutot's earnings from the N. T. Fox Lumber Company, which, after deductions for tax and work-related expenses, equals $490.00 per month.

7. Defendant David Smith is the Commissioner of the Department of Human Services. Throughout all pertinent periods he was acting in his official capacity under color of state law.

FACTS

8. Plaintiffs' AFDC grant has been reduced by a final administrative decision of David Smith dated March 18, 1976.

9. The decision of David Smith to reduce the benefits was based on a determination that Lionel's available income was to include the proportional amount of his income necessary to support the four mutual children.

10. Since that date Defendant Smith has promulgated a regulation, M.P.A.P.M. Appendix C, attached here as Appendix 1, which is interpreted by him to require families with step-children eligible for AFDC and mutual children ineligible for AFDC to treat as income available to the AFDC eligible step-children, income that is actually unavailable to them because their parents have a legal obligation under state law to use a portion of that income to support the mutual children.

11. The four mutual children are not eligible for AFDC.

12. Lionel has a legal duty to support the mutual children.

FIRST CLAIM FOR RELIEF

13. Applicable state and federal law requires that only available income be counted in determining a family's income when their AFDC grant is computed.

14. Only a proportion of Plaintiffs' income of $490.00 per month is available for themselves and their own children who are eligible for AFDC because the remainder must, by law, be used to support their four mutual children who are not eligible for AFDC.

15. Defendants' conduct, as set forth above in paragraph 10, counting as available income that remainder is a violation of

a) 42 USC § 602(a) (7)

b) 45 CFR § 233.20(a) (3) (ii) (D)

c) Maine Public Assistance Payments Manual (MPAPM) Ch. II, Sec. C, p. 1.

SECOND CLAIM FOR RELIEF

16. The decision of the Commissioner of March 18, 1976 is erroneous and constitutes a gross abuse of discretion because Lionel's income is computed on the basis of income which is not actually available. It is therefore in violation of applicable state and federal law: 45 C.F.R. § 233.20(a) (3) (ii) (D); Maine Public Assistance Payments Manual Ch. II, Sec. C, p. 1; 42 USC § 602(a) (7).

THIRD CLAIM FOR RELIEF

17. Plaintiffs are entitled to their attorney fees pursuant to 42 USC § 1988 as amended by P.L. 94-559.

PRAYER

WHEREFORE, Plaintiffs pray that this Honorable Court:

1. Certify that this action may proceed as a class action pursuant to M.R.Civ.P. 23;

2. Declare that the policy set forth in M.P.A.P.M. Appendix C which requires families with stepchildren eligible for AFDC and mutual children ineligible for AFDC to treat as income available to the AFDC eligible stepchildren, income that is actually unavailable to them because their parents have a legal obligation under state law to use a portion of that income to support the mutual children is in violation of 42 USC § 602a (7); 45 CFR § 233.20(a) (3) (ii) (D) and M.P.A.P.M. Ch. II, Sec. C., p. 1.

3. Permanently enjoin Defendants from enforcing the policy set forth in M.P.A.P.M. Appendix C which requires families with stepchildren eligible for AFDC and mutual children ineligible for AFDC to treat as income available to the AFDC eligible stepchildren, income that is actually unavailable to them

because their parents have a legal obligation under state law to use a portion of that income to support the mutual children.

4. Reverse the decision of Defendants of March 26, 1976.

5. Grant the Plaintiffs retroactive benefits.

6. Award Plaintiffs their costs and attorneys' fees.

7. Grant such other relief as is necessary and proper.

Dated: January 6, 1977

/s/ Robert Edmond Mittel,
Attorney for Plaintiffs
178 Middle Street
Portland, Maine 04111

MAINE PUBLIC ASSISTANCE PAYMENTS MANUAL

APPENDIX C

Determination of Need In Stepparent/Other Relative Cases

A. GUIDES TO DETERMINE IF THE AFDC PARENT OR OTHER SPECIFIED RELATIVE CAN BE INCLUDED IN THE AFDC GRANT

1. The combined cashable assets of the AFDC parent and stepparent or other specified relative and his/her spouse must not exceed the limits of the AFDC eligibility.

2. The net personal income of the AFDC parent or other specified relative must be less than the full standard of need for the first adult.

3. The stepparent or spouse of the other specified relative must be unable to support the AFDC parent or other specified relative.

To determine ability to support:

a. Apply the net income of the stepparent or the spouse of the other specified relative to the full standard of need for one adult and the appropriate number of his/her dependent children. Any amount which exceeds such standard will be considered available for the support of the AFDC parent or other specified relative.

b. If the surplus income of the stepparent or spouse of the specified relative is *equal* to or *greater* than the full standard of need of the first adult, the needs of the AFDC parent or other specified relative are considered to be met and, therefore, they *cannot be included* in the AFDC grant.

c. If the surplus income of the stepparent or spouse of the other specified relative is less than the full standard of need for the first adult, such surplus shall be added to the net personal income of the AFDC parent or other specified rela-

tive. If the resulting sum is *equal* to or *greater* than the full standard of need for the first adult, the needs of the AFDC parent or other specified relative are considered to be met, and, therefore, they *cannot be included* in the AFDC grant.

4. If the sum of the net personal income of the AFDC parent or other specified relative and the surplus income of the stepparent or spouse of the other specified relative is *less* than the full standard of need for the first adult the needs of the AFDC parent or other specified relative are considered to be unmet, and *can be included* in the AFDC grant, if they so choose. The surplus income of the specified relative (up to the amount that meets the needs of the AFDC parent or other specified relative) will be considered available for their support and will be included in the eligibility determination. The persons and group income of the AFDC parent or other specified relative will also be included in the eligibility determination.

B. GUIDES TO DETERMINE INCOME AVAILABLE TO AFDC GRANT FROM THE EXCLUDED PARENT WHOSE SPOUSE IS THE CHILDREN'S STEPPARENT LIVING IN THE HOME

1. Determine the stepparent's ability to support the AFDC parent by applying his net income to the full standard of need for the first adult and the appropriate number of his/her children. Any amount which exceeds such full standard (up to the full standard of need of the AFDC parent) is considered available for the support of the AFDC parent.

2. Determine the AFDC parent's personal need by applying the stepparent's surplus income to the full standard of need for the first adult.

a. If the stepparent's surplus income is equal to or greater than the full standard of need for the first adult, the total amount of the AFDC parent's net personal income will be considered available to the AFDC children and included in the payment computation.

b. If the stepparent's surplus income is less than the full standard of need for the first adult, such surplus will be

added to the AFDC parent's net income. The resulting amount of income from the parent which is in excess of the full standard for the first adult will be considered available to the AFDC children and included in the payment computation.

3. When the AFDC children are claimed jointly for income tax purposes by the excluded AFDC parent and the stepparent, acknowledgement is being made that the couple is providing at least 50 per cent of the AFDC children's needs. In those instances where the dollar value of the budgeted contribution of the excluded AFDC parent in combination with the actual contribution of the stepparent is less than 50 per cent of the needs of the AFDC children, or when the actual contributions cannot be established, the combined contribution from both sources will be adjusted to represent an amount equal to one half the appropriate full standard of need of the AFDC children.

4. In the instance of multiple AFDC cases within the same family and when a portion or all of the income from either the parent or stepparent has been considered in the eligibility determination of one AFDC case, such income will not be reconsidered in the eligibility determination of a second or third AFDC case.

STATE OF MAINE SAGADAHOC, ss.	SUPERIOR COURT Civil Action Docket No. CA-76-33
JOLINE THIBOUTOT and LIONEL THIBOUTOT, of Topsham, County of Sagadahoc, State of Maine, *Plaintiffs* vs. STATE OF MAINE and DAVID SMITH, in his capacity as Commissioner of the Maine Department of Human Services and his successors in office, *Defendants*	ANSWER

Defendant hereby answers plaintiff's complaint as follows:

1. Defendant asserts that no facts are alleged in sentences one and two, paragraph one and therefore no answer is required.

2. Defendant denies the allegations in paragraph one, sentence three.

3. Defendant asserts that no facts are alleged in paragraph two and therefore no answer is required.

4. Defendant admits the allegations contained in paragraphs numbered 3, 6, 7, 8, 11, 12, 13 and 14.

5. Defendant denies the allegations contained in paragraphs numbered 4, 5, 9, 10, 15, 16 and 17.

6. Defendant denies that Lionel Thiboutot has standing to sue the Defendant as Plaintiff.

Dated: February 28, 1977

/s/ James Eastman Smith
Assistant Attorney General
221 State Street
Augusta, Maine 04333

STATE OF MAINE
SAGADAHOC, ss.

SUPERIOR COURT
Civil Action
Docket No. CA-76-33

JOLINE THIBOUTOT and
LIONEL THIBOUTOT,

Plaintiffs

vs.

STATE OF MAINE, et als,

Defendants

STIPULATIONS OF FACT

1. These stipulations are submitted by agreement of the parties and shall constitute the entire administrative and factual record in this case.

2. The Thiboutot family resides in Topsham, Maine.

3. The only family income are wages earned by Lionel Thiboutot in his capacity as a truck driver at N. T. Fox Lumber Co. where he has been employed for the last ten years, and a small AFDC grant. Mr. Thiboutot earns $490 per month net income and Joline Thiboutot receives an AFDC grant of $64 per month on behalf of her ten-year-old child, Jeannie.

4. Mr. Thiboutot's net income is computed by the Defendants by deducting his work-related expenses from his gross income.

5. The Thiboutot family is composed of the following sub-families:

a) Four mutual children of Lionel and Joline Thiboutot who were married July 10, 1966: April, 10; Sherry, 8; Sandra, 7; and Lionel, 4;

b) Joline Thiboutot and her child: Jeanne, 12;

c) Lionel Thiboutot and his three children: Annette, 17; Donald, 15; and Diane, 14.

6. Prior to November of 1975, pursuant to regulations then in effect, AFDC benefits for the Thiboutot family were computed by attributing a portion of Lionel's net income to the support of the four mutual children identified in paragraph 5 a) above, whom he actually supported and by not attributing any portion of his income to his wife whom he was legally obligated to support.

7. In November of 1975, the Thiboutots were notified of Defendants' decision to recompute their AFDC benefits by a method not making that attribution of income to the mutual children.

8. A fair hearing was conducted to review that decision and the ruling of the Defendants following that fair hearing was to affirm that decision.

9. The specific method used, pursuant to regulations now in effect (attached as Appendix 1 to the Complaint), to presently compute the Thiboutot AFDC grant, which method has been approved by the fair hearing decision above mentioned, is set out below:

a) deduct the standard of need for a parent and three children from Lionel Thiboutot's income:

$ 490
-349
$ 141

b) attribute any excess to Joline Thiboutot and if the excess is greater than $130, exclude Joline from the needs of her portion of the AFDC grant:

$141 is greater than $130 so her needs are excluded;

c) compute her portion of the AFDC grant by subtracting the income available to her child from the ratably reduced standard of need for that one child:

$64
-0-
$64 (the grant of Joline's child);

d) since Lionel's income is greater than the standard of need for himself and his three children, they are not deprived of parental care and support and they are ineligible and receive no portion of the AFDC grant.

10. There are no administrative or procedural irregularities in this matter prior to the filing of the Complaint in this case on April 15, 1976.

11. It is further stipulated by the parties that if the Plaintiffs should prevail in this action in whole or in part and the Plaintiffs are entitled to retroactive benefits, that those benefits shall be computed not on the basis of any of the figures or calculations set forth in the above stipulations, but on the basis of the actual income and work-related expense figures for Mr. Thiboutot computed pursuant to whatever verified figures the Department's regulations require for each month in question for which he would be entitled to the receipt of retroactive benefits.

Dated: February 11, 1977

/s/ Robert Edmond Mittel
Attorney for Plaintiffs
80 Exchange Street
Portland, Maine 04111

/s/ James Eastman Smith
Attorney for Defendants
Assistant Attorney General
Department of Human Services
Augusta, Maine 04333

STATE OF MAINE
SAGADAHOC, ss.

SUPERIOR COURT
Civil Action
Docket No. CA-76-33

JOLINE THIBOUTOT and
LIONEL THIBOUTOT,

Plaintiffs

vs.

STATE OF MAINE, et al

Defendants

MOTION FOR SEPARATE TRIAL

Plaintiffs move, pursuant to M.R.Civ.P. 42, for a separate trial on the question of liability, leaving for later determination the questions of retroactive benefits and entitlement to attorneys' fees.

Dated: June 15, 1977

/s/ Robert Edmond Mittel
Attorney for the Plaintiffs

STATE OF MAINE SAGADAHOC, ss.	SUPERIOR COURT Civil Action Docket No. CA-76-33
JOLINE THIBOUTOT and LIONEL THIBOUTOT, *Plaintiffs* vs. STATE OF MAINE, et al *Defendants*	CLASS CERTIFICATION ORDER

After hearing argument from counsel and, there being no objection from the defendant, it is

ORDERED

that Plaintiffs' Motion for Class Certification of February 15, 1977 is granted. The class so certified is defined as follows:

Families in which:

a) each of the two adults has child(ren) living with them which are stepchildren of the other spouse;

b) at least one of the two adults has earned income;

c) there are mutual children of both adults living with them;

d) because of defendant's policy as set forth by Maine Public Assistance Payments Manual, Appendix C, pages 1 and 2, all of the income which is spent to support the mutual children and which is not available to support the remaining

children is nevertheless treated as available to those other remaining children.

Dated: June 28, 1977

/s/ Harold Rubin
Justice, Superior Court

STATE OF MAINE
SAGADAHOC, ss.

SUPERIOR COURT
Civil Action
Docket No. CA-76-33

JOLINE THIBOUTOT and
LIONEL THIBOUTOT,

Plaintiffs

vs.

STATE OF MAINE, et al

Defendants

ORDER AND
JUDGMENT

Having reviewed the record and briefs and having heard argument of counsel, it is hereby Ordered, Adjudged and Decreed:

1. This Judgment shall be applicable to Plaintiffs class which is composed of families in which

a) Each of the two adults have child(ren) living with them which are stepchildren of the other spouse;

b) At least one of the two adults has earned income;

c) There are mutual children of both adults living with them;

d) Because of the Defendant's policy set forth in Maine Public Assistance Payments Manual, Appendix C all of the income which is spent to support the mutual children and which is not available to the remaining children is nevertheless treated as available to those other remaining children (the stepchildren).

2. Defendant's policy, as set forth in the Maine Public Assistance Payments Manual, Chapter II, Section C, page 7 (first paragraph) and Appendix C, which requires families with step-

children eligible for AFDC and mutual children ineligible for AFDC to treat as income available to the AFDC eligible stepchildren, income that is actually unavailable to them because their parents have a legal obligation under State law to use a portion of that income to support the mutual children, is in violation of 42 USC § 602a (7); 45 CFR § 233.20(a) (3) (ii) (D) and Maine Public Assistance Payments Manual, Chap. II, Sec. C., p. 1.

3. Defendants are permanently enjoined from enforcing the above policy and are ordered to amend Maine Public Assistance Payments Manual, Chapter II, Section C, page 7, (First paragraph) and Appendix C, by adopting in their place new regulations not later than sixty (60) days from the date of the entry of this Judgment.

4. Within 90 days from the entry of this Judgment defendant shall certify to this Court that the new regulations required by Paragraph 3 have been adopted, that all members of plaintiffs' class have been notified of the new regulations and are receiving benefits in accordance with those new regulations.

5. The hearing decision of March 26th, 1976 in the case of Lionel and Joline Thiboutot is reversed and that case is remanded to the defendants for a new hearing at which time plaintiffs' entitlement for AFDC is to be determined pursuant to the regulations adopted pursuant to Paragraph 3.

6.. There being more than one claim for relief before the Court and the Court having determined that there is no just reason for delay, this Judgment is to be entered as a final Judgment forthwith, pursuant to M.R.Civ.P. 54(b). The question of retroactive benefits is reserved for later hearing and the question of plaintiffs' entitlement to attorneys' fees is reserved for further hearing thereafter.

Dated: July 14, 1977

/s/ Harold J. Rubin
Justice, Superior Court

STATE OF MAINE
SAGADAHOC, ss.

SUPERIOR COURT
Civil Action
Docket No. CA-76-33

JOLINE THIBOUTOT and
LIONEL THIBOUTOT,

Plaintiffs

vs.

STATE OF MAINE, et al

Defendants

MOTION FOR AWARD OF RETROACTIVE BENEFITS AND ATTORNEYS FEES

Plaintiff moves for an order:

1. awarding retroactive benefits to each member of Plaintiffs class, said benefits to run forward from the time they were reduced or terminated; and

2. awarding Plaintiffs their costs and attorneys fees.

Dated: August 23, 1977

/s/ Robert Edmond Mittel
Attorney for Plaintiffs

NOTICE OF HEARING

TO: James E. Smith

Please take notice that the above motion will be heard by the Court on Friday, October 21, 1977 at 9:30 a.m.

Dated: August 23, 1977

/s/ Robert Edmond Mittel
Attorney for Plaintiffs

STATE OF MAINE SAGADAHOC, ss.	SUPERIOR COURT Civil Action Docket No. CA-76-33
JOLINE THIBOUTOT and LIONEL THIBOUTOT, *Plaintiffs* vs. STATE OF MAINE, et al *Defendants*	]]]]]] INTERROGATORIES]]]]

1. Please identify all members of plaintiffs' class who have been notified of the judgment of the Court pursuant to paragraph 4 of that Judgment.

2. Are there any class members who have not been so notified?

3. If your answer to Interrogatory No. 2 is anything but an unqualified "none," please identify those class members who have not been notified and state the reasons for the failure to notify them.

4. State the total amount (of both state and federal money) to within the nearest one thousand dollars, of retroactive benefits which defendant will be obligated to pay if the plaintiffs prevail on their motion for such an award assuming the award is effective back to

a) November, 1975 or the day each class member's benefits were reduced or terminated; or

b) August, 1976.

5. If your response to plaintiffs' Admission Request No. 1 dated September 21, 1977, is anything but an unqualified admission, please state the actual percentage figure for federal matching for the period in question.

Dated: September 21, 1977

/s/ Robert Edmond Mittel
Attorney for Plaintiffs

STATE OF MAINE
SAGADAHOC, ss.

SUPERIOR COURT
Civil Action
Docket No. CA-76-33

JOLINE THIBOUTOT and
LIONEL THIBOUTOT,

Plaintiffs

vs.

STATE OF MAINE, et al,

Defendants

AFFIDAVIT OF
ROBERT E. MITTEL

I, Robert E. Mittel, being duly sworn, do state as follows:

1. I am an attorney licensed to practice law in the State of Maine and have been counsel for plaintiffs for the inception of this litigation.

2. I have been practicing law for 8½ years. For much of that time I have specialized in public assistance litigation involving both AFDC and general assistance. Reported decisions in which I was lead or co-counsel are: *Dupler v. City of Portland*, 412 F.Supp. 1314 (D.Me. 1976); *Stoddard v. Fisher*, 330 F.Supp. 566 (D.Me. 1972) (3-judge court); and *Brooks v. Smith*, 356 A.2d 723 (Me. 1975).

3. I am presently practicing in Portland, Maine and devote a considerable portion of my time to patent and copyright infringement litigation in the various federal district courts.

4. If the plaintiffs had been able to pay my fees I would have charged them $40 per hour for my services. That rate is comparable to the rates that myself and others in the community charge for commercial litigation. See the attached affidavit of Arthur B. LaFrance. (Exhibit A)

5. I have spent 69 hours on this case, as of October 1, 1977. Those hours include time spent as follows: drafting pleadings,

legal research and drafting of legal memoranda and briefs; argument of the case in the Superior Court; preparation of the judgment; negotiations with defendants; telephone calls and correspondence with my clients, opposing counsel and other attorneys. (Exhibit B)

6. A reasonable multiplier for this case, considering its complexity and the amount of increased benefits for the plaintiffs and the contingent nature of the fee is 2.

7. My expenses which include filing fees, telephone toll charges and photocopies are $102.06 (no toll calls for September 1977 are included).

8. My fees are totalled as follows:

69 hours at $40/hour	=	$ 2,760.00
Times 2		5,520.00
Plus expenses		102.06
Total		$ 5,622.06

Dated: October 6, 1977 /s/ Robert E. Mittel

STATE OF MAINE
CUMBERLAND, ss. October 6, 1977

Personally appeared before me the above-named Robert E. Mittel and made oath that the foregoing statements made by him are true according to his best knowledge, information and belief.

/s/ Pearl R. Mahany
Justice of the Peace

STATE OF MAINE
SAGADAHOC, ss.

SUPERIOR COURT
Civil Action
Docket No. CA-76-33

JOLINE THIBOUTOT and LIONEL THIBOUTOT,

Plaintiffs

vs.
STATE OF MAINE, et al

Defendants

CERTIFICATION

The Department of Human Services by its counsel, James Eastman Smith, Assistant Attorney General, in accordance with the ORDER and JUDGMENT rendered by this Court on July 14, 1977, hereby certifies the following:

1. That new regulations amending the Maine Public Assistance Payments Manual, Chapter II, Section C, page 7 (First Paragraph) and Appendix C, were adopted and effective within 60 days from the date of the entry of ORDER and JUDGMENT in the above matter.

2. That all members of Plaintiff's class have been notified of the new regulations and are receiving benefits in accordance with those new regulations if eligible.

Dated at Augusta, Maine
October 12, 1977

/s/ James Eastman Smith
Assistant Attorney General
221 State Street
Augusta, Maine 04333

STATE OF MAINE
SAGADAHOC, ss.

SUPERIOR COURT
Civil Action
Docket No. CA-76-33

JOLINE THIBOUTOT and
LIONEL THIBOUTOT,

Plaintiffs

vs.

STATE OF MAINE, et al

Defendants

ANSWER TO INTERROGATORIES

1. The names of all members of Plaintiff's class who have been notified of the judgment of the Court pursuant to paragraph 4 of that Judgment is enclosed herein.

2. All class members have been notified.

3. Not applicable.

4. Defendant will be obligated to pay approximately $16,500 to $18,500 in retroactive benefits if plaintiff's prevail on their motion for such an award assuming the award is effective back to

a) November 1975 ($18,500)

b) August 1976 ($16,500).

A more definite statement cannot be made at this time due to pending cases and lack of response from applicants.

5. Not applicable.

Dated: October 28, 1977

/s/ James Eastman Smith
Assistant Attorney General
221 State Street
Augusta, Maine 04333

STATE OF MAINE SAGADAHOC, ss.	SUPERIOR COURT Civil Action Docket No. CA-76-33
JOLINE THIBOUTOT and LIONEL THIBOUTOT, *Plaintiffs* vs. STATE OF MAINE, et al *Defendants*	FINAL JUDGMENT

Pursuant to the Order of July 14, 1977, the parties having been heard through counsel orally and by briefs, it is ORDERED, ADJUDGED and DECREED:

1. This Final Judgment shall be applicable to Plaintiffs' class which is composed of families in which

(a) Each of the two adults have child(ren) living with them which are stepchildren of the other spouse;

(b) At least one of the two adults has earned income;

(c) There are mutual children of both adults living with them;

(d) Because of the Defendants' policy set forth in Maine Public Assistance Payments Manual, Appendix C, all of the income which is spent to support the mutual children and which is not available to the remaining children is nevertheless treated as available to those other remaining children (the stepchildren).

2. Defendants' policy, as set forth in the Maine Public Assistance Payments Manual, Chapter II, Section C, page 7 (first paragraph) and Appendix C, which requires families with step-

children eligible for AFDC and mutual children ineligible for AFDC to treat as income available to the AFDC eligible step-children, income that is actually unavailable to them because their parents have a legal obligation under State law to use a portion of that income to support the mutual children, is in violation of 42 USC § 602a (7); 45 CFR § 233.20(a) (3) (ii) (D) and Maine Public Assistance Payments Manual, Chapter II, Section C, p. 1.

3. Defendants are permanently enjoined from enforcing the above policy and are ordered to amend Maine Public Assistance Payments Manual, Chapter II, Section C, page 7, (first paragraph) and Appendix C, by adopting in their place new regulations not later than sixty (60) days from the date of the entry of this judgment.

4. Plaintiffs Thiboutot are entitled to retroactive benefits.

5. Plaintiffs' motion for retroactive benefits to each member of Plaintiff's class is hereby denied.

6. Plaintiffs' motion for attorney's fees is hereby denied.

7. Plaintiffs' motion for costs is hereby granted in an amount to be agreed upon between counsel, or, if counsel are unable to agree, in an amount to be determined by the Court after further hearing.

Dated at Bath, Maine
this 23rd day of February, 1978

/s/ Louis Scolnik
Justice, Superior Court

STATE OF MAINE
SAGADAHOC, ss.

SUPERIOR COURT
Civil Action
Docket No. CA-76-33

JOLINE THIBOUTOT and
LIONEL THIBOUTOT
Plaintiffs

vs.

STATE OF MAINE, et al,
Defendants

NOTICE OF APPEAL

Notice is hereby given that plaintiffs appeal from that portion of the final judgment of the Superior Court denying retroactive benefits to the class and denying attorneys' fees.

Respectfully submitted,

Dated: March 10, 1978

/s/ Robert Edmond Mittel
Attorney for Plaintiffs

STATE OF MAINE
SAGADAHOC, ss.

SUPREME JUDICIAL COURT
Law Docket No. SAG 78-1

JOLINE THIBOUTOT, et al.,

Plaintiffs-Appellants

vs.

STATE OF MAINE, et al,

Defendants-Appellees

STIPULATION

Pursuant to M.R.Civ.P. 74(e) the parties hereby stipulate that Lionel and Joline Thiboutot presently receive $391.00 per month in AFDC benefits.

Dated: June 6, 1978

/s/ Robert Edmond Mittel
Attorney for Plaintiffs-Appellants
80 Exchange Street
Portland, Maine 04101

Dated: June 9, 1978

/s/ James E. Smith
Assistant Attorney General
Attorney for Defendants-Appellees
State House
Augusta, Maine 04333

STATE OF MAINE

LAW COURT

PORTLAND, AUGUST 31, 1979

JOLINE THIBOUTOT, et al.

vs.

STATE OF MAINE, et al.

In the above entitled case brought before the Court as a Court of Law from the Superior Court for the County of Sagadahoc and now pending on the Law Docket, the said case having been heard and maturely considered,

IT IS NOW ORDERED, That the Clerk of the Law Court now having the custody of the Law Docket enter upon said docket under said case, and certify to the Clerk of the Superior Court for the County of Sagadahoc the following order, direction, judgment and decree of the Court in said case, to wit:

Appeal sustained.

Judgment vacated insofar as it relates to denial of attorney's fees as part of costs.

Remanded to Superior Court for reconsideration of costs in the light of the opinion herein.

Attest:

James Chute
Clerk of the Law Court

Joline THIBOUTOT et al.

v.

STATE of Maine et al.
Supreme Judicial Court of Maine

Aug. 31, 1979.

Sewall & Mittel by Robert E. Mittel (orally), Portland, for plaintiffs.

James E. Smith, Asst. Atty. Gen. (orally), Augusta, for defendants.

Before McKUSICK, C.J., and POMEROY, WERNICK, DELAHANTY, GODFREY and NICHOLS, JJ.

GODFREY, Justice.

The family of Lionel and Joline Thiboutot included eight children: four by both Lionel and Joline, one by Joline but not Lionel, and three by Lionel but not Joline. In November, 1975, Lionel Thiboutot was notified by the Maine Department of Human Services of a reduction in AFDC benefits which the Department deemed required by a change of federal regulations. The change was essentially as follows: In computing the available income of Lionel in order to determine the amount of AFDC benefits allowed for Lionel's three children of whom Joline was not the mother, the Department would no longer subtract that portion of Lionel's income which went to the support of the four children of both Lionel and Joline (those children not being eligible for AFDC benefits), although Lionel was required by law to support those children and in fact did support them.

The Thiboutots pursued their administrative remedies in an effort to get the Department to revise its ruling. A final ad-

verse decision was rendered by the Commissioner on March 18, 1976. From that decision the Thiboutots filed a timely appeal under Rule 80B, M.R. Civ.P., alleging that the Commissioner's decision was in violation of state and federal welfare statutes. Both the State of Maine and David Smith, as Commissioner of the Maine Department of Human Services, were named as defendants.

On January 7, 1977, an amended complaint was filed seeking class relief as well as relief for the Thiboutots. The amended complaint, brought pursuant to 42 U.S.C. § 1983 as well as Rule 80B, alleged violation of the Social Security Act, 42 U.S.C. § 602(a) (7), and pertinent federal regulations. A motion for class action certification was filed on February 16, 1977, and granted on June 28, 1977.

A motion for a separate trial on the issue of liability was granted on June 17, 1977. On July 15, 1977, judgment was entered for the Thiboutots on the merits. Defendants were enjoined from enforcing the challenged regulation and ordered to adopt new regulations, notify all members of the Thiboutots' class of the new regulations, and pay benefits prospectively to eligible persons in the class. The trial court reserved decision on retroactivity of relief and on the right to an award of attorney's fees.

Defendants complied with the order. On February 27, 1978, final judgment was entered ordering retroactive benefits for the Thiboutots but denying plaintiffs' motions for retroactive benefits for the class and for attorney's fees. From this judgment plaintiffs appeal. The defendants have not cross-appealed. We sustain plaintiffs' appeal on the issue of attorney's fees.

I. Retroactive Benefits

[1] The appellant seeks to have the defendant State of Maine adjudicated liable to pay money to the members of the class in the form of retroactive AFDC benefits. The sovereign immunity of the State of Maine precludes such a judgment unless the state has given its consent to be sued. *Drake v. Smith*, Me., 390 A2d 541 (1978).

The Maine Legislature has not enacted any law manifesting consent that the state be subject to suit for retroactive AFDC benefits. Section 3741 of title 22 (Supp. 1965-78) provides only as follows:

> "The department is authorized to administer and operate a program of aid to dependent children within the Federal Social Security Act and any amendments and additions thereto."

Drake v. Smith, supra, makes clear that the Legislature's authorization of the state's participation with the federal government in a cooperative welfare program, such as aid to families with dependent children, does not itself constitute an implied waiver of sovereign immunity. *Id. at* 545.

[2] Appellant contends, however, that waiver of the state's sovereign immunity may be found in the promulgation of certain regulations by the Department of Human Services which, in appellant's view, mandate the payment of retroactive AFDC benefits to the class. We disagree with appellant's interpretation of those regulations.

Appellant relies on the following provision of the Maine Public Assistance Payments Manual (MPAPM):

> "If the agency's original action is reversed or in any other way modified causing a decision favorable to the claimant, the agency will take immediate steps to insure that within the 60 day period that corrected payments are made retroactively to the date the incorrect action was taken or to the date of application, whichever was later." Maine Public Assistance Payments Manual (MPAPM) ch. I., sec. C, p. 7 (Dec., 1978 Revision).[1]

The regulations contain nothing to suggest that "the claimant" includes other recipients of aid who are in a position

1. The quoted provision was in effect at the time the present action was brought.

similar to that of the claimant but have not made application for review by means of the available administrative and judicial remedies. In the first place, the provision relied on calls for retroactive payments only from the date of claimant's application if that date is later than the date of the incorrect action. Such a provision is not consistent with a purpose of affording full restitutionary relief for correction of the administrative error.

Furthermore, the context of the quoted language indicates that only persons who seek administrative and judicial review of the reduction of AFDC benefits—in this case the Thiboutots themselves—may be considered "claimants." On page 1 of Chapter I, Section C, the regulations state:

> "Federal and State law assure that any claimant, or anyone acting responsibly in his behalf, who believes that proper consideration has not been given to all circumstances surrounding his claim for assistance may request a fair hearing."

The regulations then detail the procedure by which administrative review of an adverse decision by the Department may be obtained. On page 4 of Chapter I, Section C, the regulations continue:

> "The State agency may respond to a series of individual requests for fair hearings by conducting a single group hearing. . . . In all group hearings, whether initiated by the agency or by the claimants, the policies governing fair hearings will be followed."

Here the term "claimants" is used to refer to those individuals who have requested hearings. Moreover, at the time the present action was brought, the paragraph immediately preceding the language appellants rely on provided as follows:

> "Within 5 days of the decision, a letter will be sent over the Commissioner's signature, advising the claimant of the fair hearing decision and of his right to judicial review under the Maine Rules of Civil Procedure [*sic*] Rule 80B, if he is dissatisfied with the decision. The letter will advise the claimant that if he wishes to take advantage of this right, he must file a petition for review with the Superior Court within 30 days of the receipt of the decision with which he is dissatisfied.[2]

Again "claimant" is used to mean an individual who has actually sought administrative review of an agency decision.

We conclude that the regulations did not call for the payment of retroactive AFDC benefits to the unnamed members of the class in the present action. The judgment of the Superior Court, awarding retroactive AFDC benefits to the Thiboutots but not the members of the class, is thus consistent with our interpretation of the departmental regulations, namely, that they require limited retroactive payments only to those who have been "claimants" actually pursuing their rights under the regulations. The promulgation of those regulations cannot be regarded as amounting to a waiver of sovereign immunity for purposes of appellants' action to recover retroactive benefits for all persons in their class.

[3] Appellants contend that the state may not assert sovereign immunity as a bar to their class action because each member of the class had a property right in correct AFDC payments and thus their property was taken by the state without just compensation. They cite *Foss v. Maine Turnpike Auth.*, Me., 309 A.2d 339 (1973), for the proposition that sovereign immunity is not available to the state to bar a citizen's claim for just compensation arising from a violation of the just-compensation clauses of the federal and state constitutions. U.S.Const. amend. V per amend. XIV; Me.Const. art. I, § 21.

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2. This paragraph was revised in December of 1978 and presently states: "Within five days of the decision by the Hearing Officer the copy of the decision, its basis (as described previously) and of the claimant's rights to judicial review under Maine Rules of Civil Procedures [sic] Rule 80B if dissatisfied will be mailed to the claimant. The notice will also advise the claimant that if he wishes to take advantage of this right, he must file a petition for review with the Superior Court within 30 days of the receipt of the decision with which he is dissatisfied." [sic]

[4] Despite occasional suggestions that the right to welfare aid should be regarded as a property right, as distinguished from a mere gratuity, e.g., *Goldberg v. Kelly*, 397 U.S. 254, 262 n. 8, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970),[3] not all the rights normally associated with ownership of property are available to recipients under the welfare laws and regulations. For example, the federal welfare regulations themselves impose limits on the extent to which state plans may provide for retroactive corrective payments. Thus the federal requirement that a state plan provide for prompt correction of underpayments is in terms conditioned on the existence in the plan of a provision for recoupment of overpayments. 45 C.F.R. § 233.20(a) (12) (ii). Moreover, in such a state plan, "retroactive corrective payments shall be made only for the 12 months preceding the month in which the underpayment is discovered,"[4] 45 C.F.R. § 233.20(a) (12) (ii) (a), and "no retroactive payment need be made where the administrative cost would exceed the amount of the payment," 45 C.F.R. § 233.20(a) (12) (ii) (c).

If the right to correct payments of welfare aid were a property right like the right to payments under an annuity contract or the right to rent under a lease, the correction of underpayments could not be curtailed in such a manner. In view of the qualified nature of welfare rights, cases denying the defense of state immunity where plaintiff's property has been taken by the state without just compensation cannot be relied on as precedents controlling the disposition of a class claim for retroactive welfare benefits.

[5] The state did not appeal the award of retroactive benefits to the Thiboutots. We reject appellant's suggestion that the state's failure to appeal from the judgment for the Thiboutots constitutes a waiver of sovereign immunity in the

3. Citing C. Reich, Individual Rights and Social Welfare: The Emerging Legal Issues, 74 Yale L.J. 1245, 1255 (1965). See also H. Jones The Rule of Law and the Welfare State, 58 Colum.L.Rev. 143, 154-55 (1958), and see generally C.Reich, The New Property, 73 Yale L.J. 733 (1964).

4. Applied literally in the instant case, this regulation would lead to the absurd result that because plaintiffs discovered the underpayment promptly they could recover little or nothing.

class action. The judgment of the trial court afforded exactly the relief contemplated by the departmental regulations.

[6] The complaint in the present action was amended to include a cause of action under 42 U.S.C. § 1983[5] on the basis that defendants were "persons" who had deprived plaintiffs of their rights "secured by the Constitution and laws" by violating 42 U.S.C. § 602(a) (7) (a provision of the federal Social Security Act setting forth the basic requirements for state AFDC programs) and 45 C.F.R. § 233.20(a) (3) (ii) (D), a federal welfare regulation defining available income and resources of recipients. In his judgment, the trial justice found that the defendants were violating 42 U.S.C. § 602(a) (7) and the cited welfare regulation but made no finding with respect to violation of 42 U.S.C. § 1983. Appellants contend that the rights defendants deprived them of under color of state regulation were rights "secured by the Constitution and laws" and hence within the ambit of section 1983.

Arguing that the federal courts have exclusive jurisdiction to hear actions under section 1983, appellees assert that the Superior Court had no jurisdiction to hear and determine appellants' section 1983 claim. However, the better considered cases hold that federal and state courts have concurrent jurisdiction to entertain such actions. *E.g., Brown v. Pitchess*, 13 Cal.3d 518, 119 Cal.Rptr. 204, 531 P.2d 772 (1975); *Terry v. Kolski*, 78 Wis.2d 475, 254 N.W.2d 704 (1977). *Contra, Chamberlain v. Brown*, 223 Tenn. 25, 442 S.W.2d 248 (1969). Adjudicating federal claims against state governments in the state courts is likely to produce less friction in federal-state relations and is consistent with the concept of federalism expounded in *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971). The Superior Court had jurisdiction to entertain a claim under section 1983.

5. Section 1983 provides as follows:
"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

[7] Contrary to another argument made by the appellees, the fact that the trial justice made no finding or mention of a violation of section 1983 in his order and judgment is not in itself conclusive against appellees' liability under that section. *See Hagans v. Lavine*, 415 U.S. 528, 94 S.Ct. 1372, 39 L.Ed.2d 577 (1974); *Seals v. Quarterly County Court*, 562 F.2d 390 (6th Cir. 1977). The 1983 claim was properly raised before the trial court and cannot be disregarded by the Law Court on appeal merely because the judgment of the trial court made no mention of it.

[8] Whether the appellees' violation of the federal social security law and regulations, with resulting incorrect reduction of AFDC benefits to appellants, constitutes a violation of section 1983 is by no means clear. It had been assumed in a succession of cases in the Supreme Court that section 1983 afforded an appropriate remedy for violation of rights under the federal welfare laws. *See Rosado v. Wyman*, 397 U.S. 397, 90 S.Ct. 1207, 25 L.Ed.2d 442 (1970), and other cases cited by Stewart, J., dissenting in *Chapman v. Houston Welfare Rights Organization*, _____U.S._____, _____, 99 S.Ct. 1905, 1944-45, 60 L.Ed. 2d 508, 557-58 (1979). However, the *Chapman* case itself brought to the surface serious differences of opinion within the Court over whether section 1983 encompasses a deprivation of rights arising solely out of the Social Security Act. *Chapman* did not resolve the issue, holding only that federal district courts have no jurisdiction under subsection (3) and (4) of 28 U.S.C. § 1343 to entertain a claim under section 1983 that a state welfare regulation is invalid merely because it conflicts with the Social Security Act. From the several opinions in *Chapman*, it appears that four members of the Court think section 1983 is available for relief in such a case and three think it is not. Two Justices, members of the majority, expressed no opinion on the scope of section 1983.

With some hesitancy in view of the close division in *Chapman*, we conclude that section 1983 afforded appellants a remedy in the Superior Court for deprivation of rights under the Social Security Act even though those rights were not of constitutional dimension. Until the Supreme Court has spoken definitely to the contrary, we think it would be incorrect to

ignore the long line of federal cases in which section 1983 has been treated without question as a proper vehicle for such relief. Neverthelss, appellants' claim for retroactive benefits for the class is barred by the sovereign immunity of the State of Maine.

In *Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed. 2d 662 (1974), the Supreme Court held that the immunity of the states under the Eleventh Amendment[6] bars recovery in a federal district court of retrospective welfare benefits erroneously denied by state officials before entry of the federal court's order determining the wrongfulness of their action. The Court distinguished *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), which had held that a federal court could without violating the Eleventh Amendment, enjoin state officials to conform their future conduct to the requirements of federal law even though the injunction might have some fiscal impact on the state. The Court based the distinction on the difference between prospective and retrospective relief, the latter being perceived as having potential for more drastic impact on state treasuries.

Although the rationale of *Edelman* seemed to be placed in some doubt by the decision in *Monell v. Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), holding municipalities to be "persons" subject to 1983 actions for both prospective and retroactive relief in federal courts,[7] a recent decision, *Quern v. Jordan*, _____U.S._____, 99 S.Ct. 1139, 59 L.Ed.2d 358 (1979), has reaffirmed *Edelman*, interpreting it as holding that Congress did not intend to abrogate the states' sovereign immunity when it enacted section 1 of Civil Rights Act of 1871, the precursor of section 1983. In the course of his opinion expressing the view of a majority of the Court, Mr. Justice Rehnquist said:

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6. U.S. Const. amend. XI, provides as follows:
"The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

7. Monell overruled Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed. 2d 492 (1961), which had held that a municipality was not a "person" within the meaning of section 1983.

> "Given the importance of the States' traditional sovereign immunity, if in fact the Members of the 42d Congress believed that § 1 of the 1871 Act overrode that immunity, surely there would have been lengthy debate on this point and it would have been paraded out by the opponents of the Act along with the other evils that they thought would result from the Act. Instead, § 1 passed with only limited debate and not one Member of Congress mentioned the Eleventh Amendment or the direct financial consequences to the States of enacting § 1. We can only conclude that this silence on the matter is itself a significant indication of the legislative intent of § 1." _____U.S. at _____, 99 S.Ct. at 1146, 59 L.Ed. 2d at 368.

See also *Alabama v. Pugh*, 438 U.S. 781, 98 S.Ct. 3057, 57 L.Ed. 2d 1114 (1978). The majority of the Justices in *Quern v. Jordan* reached their decision by interpreting the word "person" in section 1983 as excluding the states because of their sovereign immunity. Justices Brennan and Marshall, concurring in the result, observed that the actual decision did not require such a rationale and objected to it. We consider the issue to be still not definitely resolved by the Supreme Court.

Appellants in the instant case contend that *Edelman* and other federal decisions according immunity to the states in 1983 actions brought in federal court for retrospective damages are not applicable in a state court, where the Eleventh Amendment creates no problem. However, a theme running pervasively through the federal decisions is that unless a state has consented to being sued for retrospective welfare benefits mistakenly withheld, it should be immune to section 1983 actions for their recovery. The liability for such benefits is peculiar: First, unlike liability in tort, liability for such benefits to a class does not typically arise from wilful or even negligent wrongdoing; underpayment of welfare benefits to a class is more likely to result from good-faith misinterpretation of the complex federal regulations under which welfare programs must be administered. Second, the financial burden on the state treasury to meet retrospective payments of welfare benefits may become great if a large class of welfare recipients has been affected for a long time. The many pressing needs for

welfare assistance and the practical difficulty some states encounter in raising matching funds to meet them adequately suggest caution about compelling state welfare officials to assign priority, in effect, to correcting past underpayments, which can amount to large sums, ahead of current and perhaps more critical needs.[8] The limitation, referred to earlier in this opinion, contained in the social security regulations themselves suggest strongly that correction of past underpayments is not regarded by welfare officials as a matter of highest priority in the administration of the AFDC program.

[9] Though the question is not free from doubt, it is our conclusion that, in the absence of waiver by the state of its sovereign immunity, the state may constitutionally interpose that immunity as a bar to a class action brought in a state court under 42 U.S.C. § 1983 to recover the amount of past AFDC underpayments, at least where there is no allegation or evidence that the underpayments were made in bad faith for a racially discriminatory or other constitutionally impermissible purpose. Our reliance on *Edelman* and *Quern* accords with the rationale adopted by the Supreme Court of Washington in denying section 1983 relief in *Edgar v State*, 92 Wash.2d 217, 595 P.2d 534 (1979).[9]

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8. See *Rothstein v. Wyman*, 467 F.2d 226 (2d Cir. 1972), *cert. denied*, 411 U.S. 921, 93 S.Ct. 1552, 36 L. Ed.2d 315. But of *Jiminez v. Weinberger*, 523 F.2d 689 (7th Cir. 1975), *cert. denied sub nom. Mathews v. Jimenez*, 427 U.S. 912, 96 S.Ct. 3200, 49 L.Ed.2d 1204 (1976) (retroactive class relief permitted against the Secretary of Health, Education and Welfare where disability insurance benefits had been denied under an unconstitutional federal statutory classification). In *Jiminez*, a case strongly relied on by appellants, no question of state sovereign immunity was involved. The United States was deemed to have waived its sovereign immunity by enacting 42 U.S.C. § 404, providing for overpayments and underpayments of federal old-age, survivors, and disability insurance benefits. The court noted the difference between ordering a state to make payments of improperly withheld welfare benefits and ordering the Secretary to pay retroactive benefits out of the Federal Disability Trust Fund (42 U.S.C. § 401(b)) to which plaintiffs had contributed through taxation.
9. The circumstances of the *Edgar* case were entirely different from those of the instant case. However, *Edgar's* claim was one for money damages against the state under section 1983.

It is our conclusion also that the State of Maine has not waived its immunity from such a class action and has effectively asserted it to bar the class action for retroactive benefits under section 1983 in this case. We are led to this conclusion by the rationale of our decision in *Drake v. Smith*, Me., 390 A.2d 541 (1978), fortified by the considerations referred to above that have prompted the federal courts to accord the states an immunity under the Eleventh Amendment from similar actions.

II. Attorney's Fees

Appellants contend that they are entitled to attorney's fees under 42 U.S.C. § 1988, as amended by the Civil Rights Attorney's Fees Awards Act of 1976, P.L. 94-559 § 2, 90 Stat. 2641. The last sentence of section 1988 now provides:

> "In any action or proceeding to enforce a provision of [certain civil rights legislation, including 42 U.S.C. § 1983] the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

Appellants assume that P.L. 94-559 is applicable to the state courts and that the Superior Court in this case denied their motion for the award of attorney's fees in the exercise of its discretion. They insist that the legislative history of P.L. 94-559 indicates Congressional intent to restrict the judicial discretion to deny fees when a section 1983 action has been successful. Appellants' position is that only in exceptional cases are fees to be denied to a prevailing plaintiff in a section 1983 action. They rely partly on the Senate Report accompanying P.L. 94-559, which contains the following comment:

> "A party seeking to enforce the rights protected by the statutes covered by S. 2278, if successful, 'should ordinarily recover an attorney's fees unless special circumstances would render such an award unjust.' *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402, 38 S.Ct. 964, 19 L.Ed.2d 1263 (1968)." S.Rep. No. 94-1011, 94th Cong., 2d Sess. (1976), reprinted in [1976] U.S. Code Cong. & Admin. News, pp. 5908, 5912.

[10] Except for some kinds of tortious conduct, the Maine state courts have no authority to include attorney's fees as part of costs in the absence of statutory authorization or agreement of the parties. The Social Security Act itself contains no such authorization applicable to the violation of 42 U.S.C. § 602(a) (7) that occurred here. If appellants have any right to attorney's fees, that right must come from the provisions of section 1988 on the basis that they have "prevailed" to some extent in their section 1983 action.

Even though appellants are barred by state immunity from recovering retrospective benefits in their class action, they have prevailed on a claim cognizable under section 1983. Both in its judgment entered July 15, 1977, and in its final judgment, the Superior Court give plaintiffs prospective relief in the form of enjoining the defendants from enforcing the erroneous policy set forth in the departmental regulations and ordering them to amend the Maine Public Assistance Payments Manual. In its judgment of July 15, 1977, the court required defendants to certify that all members of plaintiffs' class had been notified of the regulations and were receiving benefits accordingly.

[11, 12] The trial court did not indicate whether it thought it was granting such prospective relief in response to plaintiffs' Rule 80B appeal or to the section 1983 count of the amended complaint. Although prospective relief was available through the 80B appeal alone, it was also available through section 1983 with the result that if the Civil Rights Attorney's Fees Awards Act is applicable to the state courts, the trial justice had discretion to award attorney's fees as part of plaintiff's costs. *See Hagans v. Lavine*, 415 U.S. 528, 94 S.Ct. 1372, 39 L.Ed.2d 577 (1974); *Seals v. Quarterly County Court*, 562 F.2d 390 (6th Cir. 1977). It was held in the *Seals* case that the presence of a substantial constitutional claim under section 1983 justified the allowance of attorney's fees even though the relief was granted exclusively on alternative state grounds.

Nothing in the language of P.L. 94-559 indicates whether it is intended to be binding on the state courts, and the Senate and House reports concerning the measure shed no light on

that question.[10] Before the amendment of 1976, the provisions of section 1988 related in terms exclusively to actions in the federal courts.[11] Congress enacted the amendment in response to the Supreme Court's decision in *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975), holding that it was error for a federal court to award attorney's fees as an element of costs in an environmental suit in equity: federal courts may not ordinarily include attorney's fees in costs without statutory authority. The genesis of the amendment was thus a case litigated in the federal court system, and the Senate and House reports address the question only in the context of federal litigation.

Although it seems extraordinary that Congress would enact a statute affecting the authority of the states to control costs in their own courts without stating explicitly its intention to do so, there can be little doubt that Congress has the constitutional power to enact a statute requiring the states to pay court costs in their own courts if it finds such a measure necessary to enforce the provisions of the Fourteenth Amendment. See U.S. Const. amend. XIV § 5; *Hutto v. Finney*, 437 U.S. 678, 98 S.Ct. 2565, 57 L.Ed.2d 522 (1978). The solecism, if it be one, of requiring the states to pay attorney's fees as part of costs in their own courts is not much greater than that of requiring them to do so in the Federal Courts, and *Hutto v. Finney, supra*, makes it clear that the Eleventh Amendment is no bar there to recovering attorney's fees against the states under section 1988. In *Hutto*, most of the Court thought that, unlike liability for retroactive damage claims, liability for attorney's fees poses no serious threat to state treasuries.

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10. For what it may be worth, in commenting on the bill that became P.L. 94-559, Representative Drinan said that the measure "would authorize State and Federal Courts to award counsel fees in actions brought under specified sections of the United States Code relating to civil and constitutional rights." 122 Cong. Rec., No. 151—Pt. II, H 12158 at 12159 (daily ed. Oct. 1, 1976) (remarks of Rep. Drinan).

11. But see *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 239-40, 90 S.Ct. 400, 24 L.Ed.2d 386 (1969) where the Court used language which seemed from context to imply that section 1988 (before its amendment in 1976) established a rule of damages applicable in a state court in an action under 42 U.S.C. § 1982.

The argument in favor of construing the Civil Rights Attorney's Fees Awards Act to apply to the state courts is derived from the main purpose of the Act: namely, to encourage private citizens to take action, which they might not otherwise take, as "private attorney's general" to enforce civil rights laws. That purpose ought to be carried out uniformly, it is said, in state courts as well as federal. The supreme courts of Alaska and Wyoming have apparently taken this view of the act, treating it as applicable to their own state courts. *Tobeluk v. Lind, Alaska*, 589 P.2d 873 (1979) (upholding a discretionary denial of fees under § 1988). In each case, the court assumed without discussion the applicability of the statute to state courts. The question of applicability was explicitly considered and resolved affirmatively by the New York Supreme Court, Appellate Division, Fourth Department, in *Young v. Toia*, 66 A.D.2d 377, 413 N.Y.S.2d 530 (1979). Furthermore, in a companion case, the same New York court imported into section 1988 the limitation on the trial court's discretion that the federal courts must observe under *Newman v. Piggie Park Enterprises*, 390 U.S. 400, 88 S.Ct. 964, 19 L.Ed.2d 1263 (1968) and *Northcross v. Board of Education*, 412 U.S. 427, 93 S.Ct. 2201,37 L.Ed.2d 48 (1973). *Ashley v. Curtis*, 67 A.D.2d 828, 413 N.Y.2d 528 (1979).

The desirability of uniform remedies throughout the nation in civil rights actions and the unanimity of such authority on the point as so far exists persuade us that the Civil Rights Attorney's Fees Awards Act of 1976 should be applied in the state courts of Maine.

As the instant case is presented to us on appeal we cannot tell why the trial justice denied an attorney's fee as part of costs, for he stated no reasons for the denial. Appellants have treated the denial as an erroneous exercise of discretion under section 1988, but we have no way of knowing whether the trial justice denied them because he thought section 1988 inapplicable or because he had exercised his discretion under section 1988 and found the allowance of attorney's fees to be inappropriate for reasons he thought sufficient. If the latter was the case, we do not know what standard he applied in considering the question.

We must therefore remand the case for reconsideration of the question of attorney's fees. Under 42 U.S.C. § 1988, the trial justice must, on remand, first exercise his discretion to determine whether plaintiffs are entitled to any award of fees. In this case, the standard for making that determination is not so nearly absolute in application as appellants suggest that it must be. Both the *Newman* and *Northcross* cases, *supra*, involved racial discrimination. In *Newman* the Supreme Court held that one who succeeds in obtaining an injunction under Title II of the Civil Rights Act of 1964 "should ordinarily recover an attorney's fee [under section 204(b) of that act] unless special circumstances would render such an award unjust." 390 U.S. at 402, 88 S.Ct. at 966. In *Northcross*, plaintiffs had prevailed in litigation aimed at desegregating the public schools of Memphis. In its judgment, the Court of Appeals for the Sixth Circuit had denied attorney's fees without stating a reason. The Supreme Court vacated the judgment insofar as it related to denial of costs and attorneys' fees and remanded to the Court of Appeals for reconsideration in the light of the *Newman* standard.

[13] We think the *Newman-Northcross* standard invites far more balancing of competing considerations than appellants seem to suggest,[12] and that all aspects of the case may be

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12. See, e.g. *Zarcone v. Perry*, 581 F.2d 1039 (2d Cir. 1978), *cert. denied*, _____U.S._____, 99 S.Ct. 843, 59 L.Ed.2d 38.

As Mr. Justice Powell observed, concurring in part and dissenting in part in *Hutto v. Finney*, 437 U.S. 678, 683, 98 S.Ct. 2565, 2584 n.7, 57 L.Ed.2d 522, 546 n.7 (1978), there is nothing in the Civil Rights Attorney's Fees Awards Act that requires the "routine imposition of counsel-fee liability on anyone." He cited the House Report to P.L. 94-559 where the following passage may be found:

"2. Judicial Discretion

The second key feature of the bill is its mandate that fees are only to be allowed in the discretion of the court. Congress has passed many statutes requiring that fees be awarded to a prevailing party. Again the Committee adopted a more moderate approach here by leaving the matter to the discretion of the judge, guided of course by the case law interpreting similar attorney's fee provisions. This approach was supported by the Justice Department on Dec. 31, 1975. The Committee intends that, at a minimum, existing judicial standards, to which ample reference is made in this report, should guide the courts in construing H.R. 15460." H.R.Rep. No. 94-1558, 94th Cong. 2d Sess. (1976).

properly taken into account by the trial justice in the exercise of his discretion. The fact cannot be overlooked that appellants' litigation has led to the correction of an erroneous state welfare rule with resulting long-term benefit to an indeterminate class of present and future AFDC recipients. The public has an important stake in the correct application of welfare funds, and the public interest has thus been served in some measure by this litigation. The *Newman-Northcross* standard thus provides a suitable starting point for the trial court's reconsideration of the award or denial of attorney's fees.

If the trial court decides on remand that an attorney's fee should be awarded, it may properly take into account any pertinent factors discussed in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974).

Because of the possibility that review by this Court of the trial court's ultimate decision may become necessary, the record should reflect the considerations on which the trial justice bases his decision.

The entry is:

Appeal sustained.

Judgment vacated insofar as it relates to denial of attorney's fees as part of costs.

Remanded to Superior Court for reconsideration of costs in the light of the opinion herein.

ARCHIBALD, J., did not sit.

RECEIVED
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-838

STATE OF MAINE

Petitioner

v.

JOLINE and LIONEL THIBOUTOT

Respondents

MOTION TO PROCEED IN FORMA PAUPERIS

Respondents Lionel and Joline Thiboutot, who are residents of Topsham, Maine, ask leave to file the attached Respondents' Brief in Opposition without prepayment of costs and to proceed in forma pauperis pursuant to Rule 53.

The Respondents' Affidavit in support of this Motion is attached.

December 10, 1979

Roger A. Putnam
Verrill & Dana
Two Canal Plaza
Portland, Maine 04112

Robert Edmond Mittel
Sewall & Mittel
Box 431, Portland, Maine 04112
ATTORNEYS FOR RESPONDENTS

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-838

STATE OF MAINE
Petitioner

v.

JOLINE and LIONEL THIBOUTOT
Respondents

AFFIDAVIT

We, Lionel Thiboutot and Joline Thiboutot, being first duly sworn do state as follows:

1. We are the Respondents in the above-captioned case.

2. We live in Topsham, Maine, with our six children in a house which we purchased for $29,000 in 1975. We believe that we have approximately $4,000 in equity in that house at present. We have no other assets other than household furniture and a 1971 Plymouth.

3. We have income from two sourses. We each receive AFDC grants totalling for both of us $285.00 per month. Mr. Thiboutot earns approximately $654.00 net pay every month.

4. Because of our poverty we are unable to pay the costs of this cause. Because of our poverty we are unable to give security for the same.

5. We believe that we are entitled to the relief we sought below for the grounds stated in the opinion of the Supreme Judicial Court of Maine.

December 13, 1979 — Joline Thiboutot
Joline Thiboutot

December 13, 1979 — Lionel Thiboutot
Lionel Thiboutot

STATE OF MAINE — December 13, 1979

COUNTY OF CUMBERLAND

Personally appeared before me the above-mentioned Joline Thiboutot and Lionel Thiboutot and made oath that the foregoing statements are true, and believed to be true where made on information and belief, according to his best knowledge, information and belief.

Ching Lee Trueheart
Notary Public
My Commission expires
1 Sept 85

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Respondents

RESPONDENTS' BRIEF IN OPPOSITION
TO THE PETITION OF THE STATE OF MAINE
FOR A WRIT OF CERTIORARI.

Roger Ashurst Putnam
Verrill & Dana
Two Canal Plaza
Portland, Maine 04112
Telephone: 207-774-4000

Robert Edmond Mittel
Sewall & Mittel
Box 431 - 178 Middle Street
Portland, Maine 04112
Telephone: 207-775-3101

Counsel for Respondents

December 1979

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1979

No. 79-838

STATE OF MAINE
Petitioner

v.

JOLINE & LIONEL THIBOUTOT
Respondents

RESPONDENTS' BRIEF IN OPPOSITION
TO THE PETITION OF THE STATE OF MAINE
FOR A WRIT OF CERTIORARI.

QUESTIONS PRESENTED

Was the Maine Supreme Judicial Court in error when it interpreted 42 USC §1983 to provide a cause of action for a violation of the "laws" of the United States, to wit, 42 USC §602(a)(7), a portion of the Social Security Act Relating to Aid to Families with Dependent Children?

Was the Maine Supreme Judicial Court in error when it ruled that 42 USC §1988 authorized an award of attorney fees in an action in which the trial court ruled in favor of respondents but found no violation of respondents' constitutional rights?

STATEMENT OF THE CASE

Respondents believe that petitioner's statement of the case is accurate with one exception. There is no evidence in the record

to support petitioners' statement that they acted in good faith (because their good faith was never in issue) in reducing respondents' AFDC benefits. (Pet. 4).

STATUTES PRESENTED

Rev. Stat. §563. The district courts shall have jurisdiction as follows:

(14) Of all proceeding by the writ of quo warranto, prosecuted by any district attorney, for the removal from office of any person holding office, except as a member of Congress, or of a State legislature, contrary to the provisions of the third section of the fourteenth article of amendment of the Constitution of the United States.

Rev. Stat. §629. The circuit courts shall have original jurisdiction as follows:

(14) Of all proceedings by the writ of quo warranto, prosecuted by any district attorney, for the removal from office of any person holding office, except as a member of Congress or of a State legislature, contrary to the provisions of the third section of the fourteenth article of amendment of the Constitution of the United States.

M.R.Civ.P. 80B. REVIEW OF GOVERNMENTAL ACTION

(a) Mode of Review. When review by the Superior Court, whether by appeal or otherwise, of any action or failure or refusal to act by a governmental agency, including any department, board, commission, or officer, is provided by statute or is otherwise available by law, proceedings for such review shall, except as otherwise provided by statute, be governed by these Rules of Civil Procedure as modified by this rule....

ARGUMENT

THE PETITION FOR CERTIORARI SHOULD BE DENIED.

The rulings of the Supreme Judicial Court that respondents had properly maintained an action under 42 USC §1983 and that 42 USC §1988 authorized an award of attorney fees will be discussed in turn.

A. The Ruling That Respondents Properly Asserted a Cause of Action Under 42 USC §1983 Setting Forth a Claim Under 42 USC §602(a)(7) Should Not Be Reviewed.

Petitioners argue that 42 USC §1983 does not mean what it says. Their position is that Chapman v. Houston W.R.O., ___U.S. ___, 99 S.Ct. 1905 (1979), held that only constitutional claims may be asserted under §1983 and thus the decision below is not in accord with applicable decisions of this Court. (Pet. 7-11). They are in error.

1. The question presented is not important enough to merit review.

Since the adoption of the Revised Statutes over one hundred years ago §1983 has protected citizens against deprivations of rights "secured by the Constitution and laws."(emphasis supplied). The statute was changed from its initial 1871 version which did not include the phrase " and laws".

Relying on the word "laws" respondents filed their §1983 action challenging petitioners' AFDC regulation as violative of 42 USC §602(a)(7) in the Maine Superior Court without asserting a constitutional claim.[1] Had this action been filed in the federal district court, 28 USC §1343(3) would have required respondents to assert a constitutional claim under §1983. Chapman, supra, so holds. And respondents' constitutional claim would have had to meet the test of Hagans v. Lavine, 415 U.S. 528 (1974).

1. Respondents joined a state law cause of action in the nature of common law certiorari under M.R.Civ.P. 80B. See the discussion in Carlson v. Oliver, 372 A.2d 226, 229 (Me. 1977).

But respondents chose to exercise an option which our federalism gives them: pursuing federal law claims in state court. Not needing a Hagans constitutional claim respondents did not make one, although they certainly could have. See Van Lare v. Hurley, 421 U.S. 338, 344 (1975).

Most all litigation in which a §1983 cause of action is asserted is brought in federal court; a constitutional claim is invariably presented or will be following Chapman. Therefore, the question presented here is one which will be exceedingly rare in the future. The petition should be denied for that reason.

2. The petition should be denied because the decision below is in accord with prior decisions of this Court.

The Maine Supreme Judicial Court recognized the division of opinion on this Court in Chapman as to the propriety of relying on the plain meaning of §1983 to allow the assertion of a purely statutory claim. However, it also recognized that in numerous cases before Chapman this Court had entertained statutorily based §1983 claims[2] and that a majority of the Justices discussing the question in Chapman had expressed themselves in favor of the respondents' position. Thiboutot v. State, 405 A.2d 230, 235-236 (Me. 1979); (Pet. A13-A14).

Two points not discussed in Chapman merit consideration. First, Congress had not one but two chances to correct errors in the Revised Statutes. Because the 1874 version was so inaccurate a second edition was proposed and enacted in 1878. No change was

---

2. The cases are collected in Justice White's Opinion, 99 S.Ct. at 1937-1938.

made or even proposed in §1979 (the predecessor of 42 USC §1983) at either time. M. Price and H. Bitner, Effective Legal Research 29 (1969). If the addition of the phrase "and laws" to §1979 was error, it is indeed strange that no attempt was made to correct it in 1878.

Second, Justice Powell's concurrence finds that because of inability or oversight the revisers were unable to use identical language to express identical meaning in §563(12) and §629(16) of the Revised Statutes. To give those sections identical meaning the revisers' error is "corrected" by adding the words which appear only in §629(16) "providing for equal rights" to §563(12), thereby limiting the application of §563(12) to "any law providing for equal rights". §563(12) had initially applied to "any law". A similar "correction" is then made in Rev. Stat. §1979 (1878) and thus §1983 is interpreted as not allowing the assertion of purely statutory claims. 99 S.Ct. at 1924 and n.15.

However, where they intended identical meaning in those statutes, the revisers used identical words. Compare §563(14) with §629(14).[3] The Court below was correct in reading the word "laws" in §1983 to allow the assertion of purely statutory claims.

Nevertheless, if this question was not ripe for resolution in Chapman, respondents suggest that there has been insufficient time to allow further development in this area by lower courts and that it is still not ripe for resolution.[4]

---

3. There is one typographical error in §563(14): "proceeding(s)" does not have an "s".

4. Two other courts have decided this question since Chapman and have resolved it in favor of respondents' position. Louise B. v. Coluatti, 606 F.2d 392, 398 (3rd Cir. 1979); Tongol v. Usery, 601 F.2d 1091, 1099-1100 (9th Cir. 1979).

B. The Ruling That 42 USC §1988 Authorizes an Award of Attorney Fees When There is No Finding of a Violation of Respondents' Constitutional Rights Should Not Be Reviewed.

As to the question that petitioners present, but do not seem to argue, the decision of the court below was in accord with the Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641 (codified at 42 USC §1988). The history of the Act states that a finding of a constitutional violation is not necessary to support an award of fees in a §1983 action. S.Rep. 94-1011, 94th Cong., 2nd Sess. 4 (1976); H.R.Rep. 94-1558, 94th Cong., 2nd Sess. 7 n.4 (1976). Seals v. Quarterly County Court, 562 F.2d 390, 393-394 (6th Cir. 1977). This question does not raise an important question and the petition should be denied.

The petitioner argues that certiorari should be granted to consider this question because this Court granted certiorari to consider it in Maher v. Gagne, No. 78-1888, cert. granted, ____U.S. ____, 100 S.Ct. 44 (1979). (Pet. 11-12) Again they are in error.

The first question presented in Maher is whether a plaintiff in a case that is settled is a prevailing party within the meaning of 42 USC §1988. The instant case was litigated to a conclusion; it was not settled. 405 A.2d at 232. Maher was settled. Therefore the first question presented in Maher is not present in this case.

The second question presented in Maher is whether an award of fees against the state may be justified as "ancillary" in

the face of an Eleventh Amendment objection. This question was not raised by petitioners below nor was it decided by the Supreme Judicial Court.[5] Therefore it may not be raised here by petitioner. 28 USC §1257(3).[6]

Assuming that the question was properly raised by petitioner, the opinion below is in conformity with opinions of this Court. Hutto holds that an award of fees against a state is ancillary. 437 U.S. at 695-698. Also, the Eleventh Amendment has by its terms no applicability to state court actions. State sovereign immunity is unavailable in the face of a federal law claim. Ferri v. Ackerman, ____U.S.____, 48 U.S.L.W. 4054, 4055 (1979); see Testa v. Katt, 330 U.S. 386 (1947).

Thus, none of the questions presented in Maher are present in this case and even if present are so insubstantial that the petition should be denied.

---

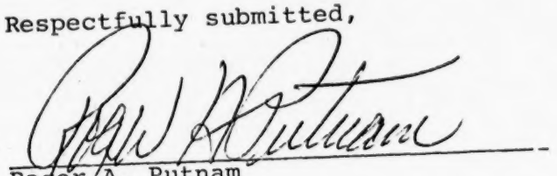
5. A copy of petitioner's summary of argument in the Supreme Judicial Court is attached as an Appendix. The discussion of Hutto v. Finney, 437 U.S. 678 (1978), in the opinion below covered Congress' power under §5 of the Fourteenth Amendment and not the ancillary effect doctrine. 405 A.2d at 239; (Pet. A24).

6. At the time respondents submitted their claim of fees to the Superior Court, the petitioner's financial exposure in the future due to respondents' success on the merits was approximately $40,000 per year. The amount of fees claimed was $5,600; an amount of fees that small seems to cause only an ancillary effect on the state's treasury. Petitioner's arguments about financial disaster (Pet. 8) fall wide of the mark. An award of fees will be ancillary.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,



Roger A. Putnam
Verrill & Dana
Two Canal Plaza
Portland, Maine 04112
Telephone: 207-774-4000

Robert Edmond Mittel
Sewall & Mittel
178 Middle Street - Box 431
Portland, Maine 04112
Telephone: 207-775-3101

Counsel for Respondents

December 1979

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STATUTORY APPENDIX

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-838

STATE OF MAINE AND MICHAEL R. PETIT, COMMISSIONER OF THE DEPARTMENT OF HUMAN SERVICES, STATE OF MAINE,

Petitioners,

v.

JOLINE THIBOUTOT AND LIONEL THIBOUTOT, AND ON BEHALF OF OTHERS SIMILARLY SITUATED,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE STATE OF MAINE

BRIEF FOR PETITIONERS

RICHARD S. COHEN
ATTORNEY GENERAL

JAMES EASTMAN SMITH
ASSISTANT ATTORNEY GENERAL

STATE HOUSE
Augusta, Maine 04333

Counsel for Petitioners.

March 1980

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-838

STATE OF MAINE AND
MICHAEL R. PETIT

Petitioners,

v.

JOLINE THIBOUTOT AND
LIONEL THIBOUTOT, *et al.*,

Respondents.

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the Maine Supreme Judicial Court is reported at 405 A.2d 230 (Me. 1979). (A.49-65.)

The opinion of the Maine Superior Court for Sagadahoc County is unreported. (A. 43-44.)

JURISDICTION

The Judgment of the Supreme Judicial Court (A. 47) was entered on August 31, 1979. The petition for a writ of certiorari was filed on November 29, 1979, and was granted on January 21, 1980, at which time

this Court also granted respondents' motion for leave to proceed *in forma pauperis*. The jurisdiction of this Court rests upon 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Whether petitioners' good faith violation of the Federal Social Security Act and its regulations, with resulting incorrect reductions of AFDC benefits to respondents, but without a violation of respondents' constitutional rights, constitutes a violation of 42 U.S.C. § 1983.

2. Whether the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, allows consideration of an award of attorney's fees to respondents who prevail solely on a Social Security claim in an action where no violation of constitutional rights was found.

3. Whether 42 U.S.C. § 1983 affords respondents a remedy in a state court for a violation of the Social Security Act.

STATUTES INVOLVED

United States Code, Title 42:

§ 602. *State plans for aid and services to needy families with children; contents; approval by Secretary*

(a) A State plan for aid and services to needy families with children must . . . (7) except as may otherwise be provided in clause (8), provide that the State agency shall, in determining need, take into consideration any

other income and resources of any child or relative claiming aid to families with dependent children, or any other individual (living in the same home as such child and relative) whose needs the State determines should be considered in determining the need of the child or relative claiming such aid, as well as any expenses reasonably attributable to the earnings of such income;

§ 1983. *Civil action for deprivation of rights*

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

§ 1988. *Proceedings in vindication of civil rights*

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and

changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

As amended Pub. L. 94-559, § 2, *Oct.* 19, 1976, 90 *Stat.* 2641.

STATEMENT

The plaintiffs, Lionel and Joline Thiboutot, are married with eight children: four are common to the marriage, one is Joline Thiboutot's by a prior marriage and three are Lionel Thiboutot's by a prior marriage. Before November, 1975, Lionel Thiboutot received Aid to Families with Dependent Children[1] benefits based upon a regulation promulgated by the State of Maine

[1] Hereinafter referred to as AFDC.

which the United States Department of Health, Education and Welfare found out of compliance with Federal regulations. In November of 1975, the Maine Department of Human Services[2], acting on its belief that a reduction in Lionel Thiboutot's AFDC benefits was required by a change in Federal regulations, notified Lionel Thiboutot of same. The change was essentially as follows: In computing the available income of Mr. Thiboutot to determine the amount of AFDC benefits allowed for his three children by his former marriage, the Department would no longer subtract that portion of Lionel's income which went to the support of the four children of both Lionel and Joline (those children not being eligible for AFDC benefits), although Mr. Thiboutot was required by law to support those children and did in fact support them. (A. 23-25.)

The Thiboutots pursued their administrative remedies in an effort to get the Department to revise its ruling. A final adverse decision was rendered by the Commissioner of the Department on March 18, 1976. From that decision the Thiboutots filed a timely appeal to the Maine Superior Court under Maine Rules of Civil Procedure, Rule 80B[3], alleging that the Commissioner's decision was in violation of state and federal statutes. Both the State of Maine and David Smith, as Commissioner of the Maine Department of Human Services, were named as defendants, the latter having been succeeded by petitioner Michael R. Petit, the present Commissioner. (A. 7-9.)

[2] Hereinafter sometimes referred to as the Department.

[3] Hereinafter sometimes referred to as Rule 80B. Rule 80B is set forth in part, *infra* at 17, n.16.

On January 7, 1977, an amended complaint was filed seeking class relief as well as relief for the Thiboutots. The amended complaint, brought pursuant to 42 U.S.C. § 1983 as well as Rule 80B, alleged violation of the Social Security Act, 42 U.S.C. § 602(a) (7), and pertinent federal and state regulations. (A. 11-15.)

A motion for a separate trial on the issue of liability was granted on June 17, 1977. (A. 27.) On July 15, 1977, the Maine Superior Court entered judgment for the Thiboutots on the merits. Petitioners were enjoined from enforcing the challenged regulation, and ordered to adopt new regulations, notify all class members of the new regulations, and pay benefits prospectively to eligible class members. The Superior Court reserved decision on retroactivity of relief and on the right to an award of attorney's fees. (A. 31-32.)

Petitioners complied with the order. (A. 39.) On February 27, 1978, final judgment was entered ordering retroactive benefits for the Thiboutots but denying plaintiffs' motion for retroactive benefits for the class and for attorney's fees. (A. 43-44.) Plaintiffs appealed from this judgment while petitioners did not cross-appeal. (A. 45.)

The appeal was argued before the Supreme Judicial Court in September, 1978, and final judgment was rendered on August 31, 1979. (A. 49.) Maine's highest court remanded the case to the Superior Court for a determination as to whether attorney's fees should be awarded to plaintiffs' counsel. Further hearings on that issue have been stayed in the Superior Court pending the decision of this Court.

However, the Supreme Judicial Court concluded, *inter alia*, that a right exists to sue under 42 U.S.C. § 1983 in state court (*Opinion, paragraph* 8; *A.* 56); that a similar right exists to enforce the provisions of

the Social Security Act even though the claim is not of constitutional dimension (*Id.*); and that an award of attorney's fees for a violation of the Social Security Act may be appropriate pursuant to 42 U.S.C. § 1988 even though no constitutional rights have been violated (*Opinion, paragraphs* 11, 12; *A.* 61).

The petitioner-State of Maine thereupon filed its petition for certiorari which was granted by this Court on January 21, 1980.

SUMMARY OF ARGUMENT

I. As set forth in the factual Statement and Questions, *supra*, the issues in this case concern the applicability of 42 U.S.C. § 1983 in an action involving, *at most*, a good faith dispute over the computation of welfare benefits arising out of differing interpretations of the Social Security Act and related regulations. The Court below, broadly applying the language of section 1983, held that the state's technical administrative error in interpreting the Social Security Act constituted a "deprivation of . . . rights . . . secured by the . . . laws . . . .," thereby enabling consideration of an award of fees pursuant to the Civil Rights Attorney's Fees Awards Act of 1976. This decision was erroneous, as scrutiny of the above three relevant Acts clearly shows.

The historical background of 42 U.S.C. § 1983 portrays the United States, at the time of the enactment of that section's predecessors, as a country racked with racial violence, racial discrimination, and deprivations of fundamental human rights. *Monroe v. Pape*, 365 U.S. 167, 172-174 (1961), *rev'd, Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978). Primarily to provide for enforcement of the

Fourteenth Amendment[4], and to counteract these rampant violations of basic liberties, Congress enacted several Civil Rights Acts[5]. However, the case at bar has little in common with those Acts as demonstrated by respondent Thiboutots' pleadings and the lower court's opinion.

On April 14, 1976, respondents filed their complaint alleging "violation of applicable state and federal law," but only as it related to the Social Security Act, 42 U.S.C. § 602(a)(7). (*Complaint, paragraphs* 1 *and* 8; A. 7-8.) On October 19, 1976, the Civil Rights Attorney's Fees Awards Act of 1976, Public Law 94-559, amending 42 U.S.C. § 1988 and codified therein, was enacted. *Supra* at 3-4. Shortly thereafter, respondents amended their complaint by adding the words "and 42 U.S.C. § 1983." (*Amended Complaint, paragraph* 1, A. 11.) It is this seemingly innocuous inclusion in the complaint that has, in petitioners' view, led to the current debate regarding the applicability of § 1983 to the Social Security Act and respondents' claim to attorney's fees pursuant to § 1988. Petitioners assert that, given the genesis of § 1983, a violation of civil rights, as those rights are commonly understood, must occur in order for that section to be violated. Certainly, a good faith[6] attempt to comply with duly pro-

[4] *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 611 (1979).

[5] See Civil Rights Act of 1866, 14 Stat. 27; §1 of the Civil Rights Act of 1871, 17 Stat. 13; Revised Stat. 1979 (1874). "Section 1983 first appeared in its present form as § 1979 of the Revised Statutes[3], which in turn was derived from § 1 of the Civil Rights Act of 1871, 17 Stat. 13." *Id.* at 624 ([3]Revised Stat. § 1979 is identical to 42 U.S.C. § 1983; *Id.* at n.3.)

[6] There was no malice, ill-will, bad faith or similar allegation pleaded by respondents or found by the lower court.

mulgated rules[7] believed to be in conformity with federal regulations[8] and applicable law (Social Security Act § 602(a)(7)) cannot result in the deprivation, under § 1983, of respondents' civil rights, without more. This is especially true when, as the court below has concluded, *rights of constitutional dimensions are not involved.* (*Emphasis added*) (*Opinion, Supreme Judicial Court, paragraph* 8; *A.* 56.)

II. Even if this Court determined that the provisions of 42 U.S.C. § 1983 encompass violations of the Social Security Act, it does not necessarily follow that an award of attorney's fees should properly be considered pursuant to the Civil Rights Attorney's Fees Awards Act of 1976. In fact, at least two factors militate against such a grant. First, an award of counsel fees for a violation of the Social Security Act is unwarranted absent specific Congressional authorization. *Alyeska Pipeline Service Company v. Wilderness Society*, 421 U.S. 240 (1975). Although Congress has, since 1870, amended more than fifty statutes[9] to provide for the awarding of attorney's fees, it has declined to so amend that portion of the Social Security Act regarding the AFDC program. By this inaction, Congress has demonstrated that it is satisfied with the present remedies contained within the statutory scheme of the Social Security Act.

Second, the legislative history reveals that the Fees Act was intended to apply to parties who prevailed in

[7] Maine Public Assistance Payments Manual (MPAPM) Ch. II, App. C, at 1, 2 (A. 17-19).

[8] 45 C.F.R. § 233.20(a)(3)(ii)(D).

[9] S. Rep. No. 94-1011, 94th Cong., 2d Sess., *reprinted in* [1976] *U.S. Code Cong. and Ad. News* 5910, *at* 3.

an action to enforce civil rights. Clearly, no such rights are at issue in the case at bar. Consequently, the Maine Court erred in applying the Fees Act where no clear legislative authorization or intent was present.

III. Petitioners alternatively assert that state courts are without jurisdiction to consider alleged § 1983 causes of action, and therefore are precluded from considering an award of attorney's fees pursuant to the Fees Act. The legislative history of 42 U.S.C. § 1983 reveals that Congress intended to create a cause of action for the violation of civil rights cognizable exclusively in Federal courts. Since no specific or implied jurisdictional grant to state courts exists, jurisdiction therein cannot lawfully be found.

ARGUMENT

I.

A GOOD FAITH ERROR IN INTERPRETING THE SOCIAL SECURITY ACT DOES NOT RESULT IN A DEPRIVATION OF RIGHTS AS CONTEMPLATED BY 42 U.S.C. § 1983.

A. *The History of* 42 *U.S.C.* § 1983, *In Conjunction with the Pleadings and Opinion in the Present Case, Does Not Allow for a Finding of a Section* 1983 *Violation.*

Petitioners argue that section 1983 does not encompass a deprivation of rights arising solely out of the Social Security Act § 602(a)(7) (AFDC program). Although the legislative history of both section 1983 and its predecessors was thoroughly discussed in *Chapman v. Houston Welfare Rights Organization,* 441 U.S. 600 (1979), petitioners submit that the inter-

pretation of the statutory phrase "and laws"[10] as provided by several Justices therein is open to question. A correct interpretation of these words is of vital importance, for in order to assert a claim for an award of attorney's fees pursuant to the Civil Rights Attorney's Fees Awards Act of 1976[11], respondents must have prevailed on a claim recognized as a section 1983 action or proceeding. Since there are no constitutional rights involved in this matter (*Chapman, supra* at 615) (*Paragraph* 8, A.56), respondents must rely upon the Maine Supreme Judicial Court's erroneous conclusion that the "and laws" provision of section 1983 affords them a remedy for a deprivation of rights under the Social Security Act. *Id.*

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[10] 42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution *and laws*, shall be liable to the party injured in any action at law, suit in equity, or other proper proceedings for redress. (*Emphasis added*)

The words "and laws" were added in the revision of 1874, Revised Stat. § 1979. *Chapman* at 608.

[11] 42 U.S.C. § 1988 provides in pertinent part:

> In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

In order to understand properly the scope of section 1983 and its predecessor, section 1979[12], a look at the social environment that existed at the time of the enactment of section 1979 is necessary. Such an overview is provided by *Monroe v. Pape*, 365 U.S. 167 (1961), *rev'd, Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978).

> Section 1979 came onto the books as § 1 of the Ku Klux Klan Act of April 20, 1871. It was one of the means whereby Congress exercised the power vested in it by § 5 of the Fourteenth Amendment to enforce the provisions of that Amendment. The Title of the legislation was: "AN ACT to enforce the provisions of the Fourteenth Amendment to the Constitution of the United States, and for other purposes."

365 U.S. at 171. President Ulysses S. Grant sent a message to Congress supporting the enactment of the "Ku Klux Klan Act" on March 23, 1871. The message read, in part:

> A condition of affairs now exists in some states of the Union rendering life and property insecure and the conveying of the mails and the collection of the revenue dangerous . . . Therefore, I urgently recommend such legislation as in the judgment of Congress shall effectively secure life, liberty, and property, and the enforcement of law in all parts of the United States . . . *Id.* at 172, 173.

"This Act of April 20, 1871 . . . was passed by a Congress that had the Klan particularly in mind." *Id.* at

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[12] See n. 5 at 8, *supra*.

174. Indeed, an Ohio representative, Mr. Beatty, stated in the United States House of Representatives his view of the Act as cited by the Court at 175:

> . . . certain States have denied to persons within their jurisdiction the equal protection of the laws. The proof on this point is voluminous and unquestionable. [M]en were murdered, houses were burned, women were outraged, men were scourged . . .

A further examination of the history of section 1983 reveals that its primary purpose was to enforce the provisions of the Fourteenth Amendment[13]. *Lynch v. Household Finance Corp.*, 405 U.S. 538, 545 (1971); *Mitchum v. Foster*, 407 U.S. 225, 242 (1971); *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 611 (1979). Furthermore, the *Monroe* Court identified three specific problem areas existing at the time of the enactment of § 1979, which demanded the creation of a judicial remedy to safeguard Fourteenth Amendment rights. First, certain kinds of state laws which were contrary to the rights of Negroes were to be overridden. Second, a remedy was provided to be utilized where a state law existed in theory but was unavailable in practice. Third, a federal remedy was provided to be utilized where a state remedy existed in theory but was unavailable in practice. 365 U.S. at

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[13] The Court in *Chapman* stated:

"**. . . [I]t is also clear that the prime focus of Congress in all of the relevant legislation was ensuring a right of action to enforce the protections of the Fourteenth Amendment and the federal laws enacted pursuant thereto." 441 U.S. at 611. Of course, the Social Security Act was not enacted to enforce the protection of the Fourteenth Amendment, nor was it enacted pursuant thereto.**

174. An additional contemporaneous problem area noted at a later time by the Court was the need for a remedy when a public official abused his position. *Imbler v. Pachtman*, 424 U.S. 409, 433 (1976) (White, J., *concurring*); *cf. United States v. Classic*, 313 U.S. 299, 326 (1941) (wherein it was stated that a cause of action provided by section 1983 is basically one for "misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law").

Neither the primary purpose underlying the enactment of section 1983, the protection of Fourteenth Amendment rights, nor the particular areas recognized as requiring remedial action by the Congress are at issue in the case at bar. Nowhere in the complaint (A. 7) or the amended complaint (A. 11) is there any allegation of a denial of any Fourteenth Amendment right. Nowhere in the Order of the Superior Court (A. 31-32), nor in the Final Judgment of the Superior Court (A. 43-44), is there contained any finding of a denial of Fourteenth Amendment rights, or, for that matter, any other constitutional rights. On appeal, the Maine Supreme Judicial Court concluded that the rights to receive welfare benefits under the Social Security Act "were not of constitutional dimension." (*Paragraph* 8, A. 56). Here, as in *McCall v. Shapiro*, 416 F.2d 246, 250 (2d Cir. 1969), ". . . [T]here appears no claim of racial or other impermissible classification or discrimination or other classic civil rights issue, but rather a question of statutory interpretation by the Commissioner in a single case." Certainly, 42 U.S.C. § 1983 was never intended to be applied to a violation of the Social Security Act, and to allow such an application was clearly erroneous.

B. *The Applicable Provisions of the Social Security Act Do Not Provide for Equal or Civil Rights as Contemplated by Section* 1983.

Section 1983, standing alone, does not provide protection for civil rights since it contains no provisions for any substantive rights. *Chapman, supra* at 618. Moreover, "an allegation of incompatibility between federal and state statutes and regulations does not, in itself, give rise to a claim 'secured by the Constitution' " [within the meaning of § 1343(3)], *Chapman*, 441 U.S. at 615. Petitioners, therefore, not unlike the Court of Appeals in *Gonzales v. Young*[14], fail to perceive how the respondents' "civil rights" were violated. Indeed, the Social Security Act does not deal with the concept of "equality" or with the guarantees of "civil rights" as those terms are commonly understood. *Chapman, supra* at 621. In fact, while discussing jurisdictional questions, the Court in *Chapman* shed some light on the applicability of § 1983 to civil rights actions.

> We reach a similar conclusion with respect to the argument that § 1983 is a statute 'providing for the protection of civil rights, including the right to vote'. Standing alone, § 1983 clearly provides no protection for civil rights since, as we have just concluded, § 1983 does not provide any substantive rights at all. To be sure, it may be argued that § 1983, does in some sense 'provide[s] for the protection of civil rights' when it authorizes a cause of action based on the deprivation of civil rights

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[14] 560 F.2d 160, 167 (3d Cir. 1977), *aff'd sub nom. Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600 (1979): "No claim was made by Gonzales of infringement of personal liberty, unlawful classification, or discrimination."

> guaranteed by other Acts of Congress. But in such cases, there is no question as to jurisdiction, and no need to invoke § 1983 to meet the 'civil rights' requirements of § 1343(4); the Act of Congress which is the actual substantive basis of the suit clearly suffices to meet the requisite test. It is only when the underlying statute is not a civil rights act that § 1983 need be invoked by those in claimant's position to support jurisdiction. And in such cases, by hypothesis, § 1983 *does not provid*[*e*] *for the protection of civil rights.*'" (Footnote omitted.) 441 U.S. at 618. (*Emphasis added.*)

Since section 1983 does not substantively assist the respondents in this matter, it becomes apparent that it was pleaded solely to enable respondents to assert a claim for attorney's fees pursuant to the Attorney's Fees Awards Act of 1976, and not to assist respondents in obtaining relief as section 1983 was originally designed to do. Although the Supreme Judicial Court rejected petitioners' argument that since the lower court did not make a finding or mention of any section 1983 violation, there could not be an award of attorney's fees pursuant to the Attorney's Fees Awards Act (*paragraph* 7, A.56), it is difficult to ascertain how the trial court could have found otherwise. There were no allegations of Fourteenth Amendment denials in any of respondents' pleadings, nor were there any assertions of violations of civil rights. The lower court could not find in theory what did not exist in reality.

When respondents amended their complaint to include a reference to section 1983, (*Amended Complaint, paragraph* 1, A. 11), the change in language

was not necessary to state a cause of action under Maine law (MPAPM)[15] (Rule 80B)[16], or to obtain jurisdiction in a state court, or receive the relief prayed for and awarded *except* as it affected the possible granting of attorney's fees. (*Final Judgment*, A. 43-44.) In Maine, as in most other states, applicants for Aid to Families with Dependent Children have administrative and judicial recourse for a denial or reduction of welfare benefits. For example, claimants may request a "fair hearing" as provided for by § 602(a)(4) of the Social Security Act (Title 42) in order to determine the correctness of the state's action. Also, the Maine Public Assistance Payments Manual allows for judicial review if a "fair hearing" decision is adverse to the AFDC applicant. It is apparent that the respondents had ample remedies available to test the validity of the Commissioner's decision and, therefore, the addition of the bare § 1983 language in the complaint was superfluous as it related to the underlying Social Security claim.

If the Maine court's decision is allowed to stand, challenges to state laws and regulations based on the

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[15] Maine Public Assistance Payments Manual, Chapter I, section C, p. 7 (July, 1974), reads in part: "Within 5 days of the decision, a letter will be sent . . . advising the claimant . . . of his right to judicial review under the Maine Rules of Civil Procedure, Rule 80B. . . ."

[16] Maine Rules of Civil Procedure, Rule 80B, first sentence: "When review by the Superior Court, whether by appeal or otherwise, of any action or failure or refusal to act by a governmental agency, including any department, board, commission, or officer, is provided by statute or is otherwise available by law, proceedings for such review shall, except as otherwise provided by statute, be governed by these Rules of Civil Procedure as modified by this rule."

Supremacy Clause alone will have § 1983 pleadings annexed for the sole purpose of receiving attorney's fees, no matter how far removed from "civil rights" violations the underlying claim may be. Indeed, it is not improbable to hypothesize a virtually limitless number of widely varied actions challenging the good faith decisions of federal, state and local officials while concomitantly alleging a deprivation of a "right" secured by "law" for the purposes of receiving an award of attorney's fees. Certainly, if a good faith disagreement over the interpretation of technically complex language contained in the Social Security Act constitutes a deprivation of a "civil right," petitioners are hardpressed to think of any state or local action that could not similarly be framed as a civil rights violation. Obviously, this was not the intent of the drafters of section 1983 and its predecessors.

II.

THE PROVISIONS OF THE CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT OF 1976 DO NOT AUTHORIZE AN AWARD OF ATTORNEY'S FEES IN THIS CASE.

A. *The Legislative History of the Fees Act in the Senate Indicates that the Act was not Intended to Apply to the Case at Bar.*

The Civil Rights Attorney's Fees Awards Act of 1976, Public Law 94-559, amending and codified in 42 U.S.C. § 1988, was enacted in response to the decision in *Alyeska Pipeline Service Company v. Wilderness Society*, 421 U.S. 240 (1975)[17]. The *Alyeska* Court

[17] S. Rep. No. 94-1011, 94th Cong., 2d Sess., *reprinted in* [1976] *U.S. Code Cong. and Ad. News* 5911, *at* 4.

upheld the "American Rule," which stated that attorney's fees are not ordinarily recoverable in federal litigation by the prevailing litigant in the absence of statutory authorization. 421 U.S. at 247. A thorough review of the history of the Fees Act discloses specific legislative authorization to award attorney's fees to litigants who have, *unlike the respondents Thiboutot*, been deprived of their civil rights.

The Senate Judiciary Committee Report pertaining to the Fees Act is replete with references to fundamental "civil rights." The Report listed examples of civil rights cases involving discrimination in the areas of employment, housing and private facilities[18] in which an award of attorney's fees was proper. Also, the Judiciary Committee found that, as a result of the "*Alyeska*" decision, fees were "suddenly unavailable in the most fundamental civil rights cases[19]." The Committee concluded that it seemed anomalous that attorney's fees were available in some civil rights cases, but unavailable in suits under § 1983 brought to redress "violations of the Federal Constitution *or laws* by officials sworn to uphold" same[20]. (*Emphasis added.*) Petitioners' submit that when the preceding quotation is read in conjunction with the above noted examples of discrimination, there emerges the conclusion that "*or laws*" refers to those affecting fundamental civil rights.

Proceeding from the Senate Report to the Senate debates, it is once again apparent that the Senators who participated therein believed that the Fees Act would apply to historically defined civil rights actions.

[18] *Id.*
[19] *Id.*
[20] *Id.*

Senator Scott stated that the legislation "would greatly aid the cause of human rights in this country[21]" and would enable the fight to eradicate "discrimination to continue[22]."

Senator Kennedy spoke of the Act as assuring "equal protection of law" to all citizens while protecting them against discrimination, while Senator Hathaway was wary of violations "of fundamental human rights going unchallenged[23]" without the provisions of the Fees Act. Other examples of the kinds of civil rights to be affected by this Act were enunciated by Senators Thurmond and Goldwater, the former offering an amendment to exclude busing cases from the Act[24] and the latter introducing an amendment to include the Internal Revenue Code within the confines of § 1988. While discussing his proposed amendment, Senator Goldwater alluded to abuses of civil rights practiced because "of a man's color or religion[25]." At long last, mention was finally made specifically of the Social Security Act by Senator Helms. However, this passing remark was made only in reference to the increasing caseloads of administrative law judges[26].

Although Senator Abourezk appears to be the only member of the Senate to state a belief that Supremacy Clause cases were also covered by the legislation[27], his suggestion is totally inconsistent with the concept of fundamental "civil rights" to which the Act was meant

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[21] 122 Cong. Rec. 31471 (1976).
[22] *Id.*
[23] 122 Cong. Rec. 31832 (1976).
[24] *Id.*
[25] *Id.* at 32176.
[26] *Id.* at 32933-34.
[27] *Id.* at 33315.

to apply. The Senator, in the same breath, also spoke of eradicating discrimination and insuring that "equal protection under the law" is achieved[28]. Finally, examples of the kinds of cases to which the Fees Act was intended to apply were listed by Senator Kennedy, a primary supporter of the bill:

1. A U.S. Army veteran died, but couldn't be buried in a local cemetery because his skin was black.

2. Black citizens were systematically kept off the jury lists.

3. "...[A] musician was repeatedly followed by police, stopped, harassed and arrested-again because of skin color."

4. Doctors participating in a program of medical assistance to black citizens were denied any privileges in a local hospital.

5. [A] highway was planned to go through black neighborhoods thereby displacing its residents, while carefully skirting around white neighborhoods.

6. Housing projects charged higher rents to those on welfare.

7. Housing authorities operated separate projects rigidly segregated by race.

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[28] *Id.*

8. Mental patients were forced into involuntary, unpaid labor[29].

Clearly, the Senate was thinking of protecting fundamental civil rights and not of providing attorney's fees in *any case* involving a legal wrong.

B. The Legislative History of the Fees Act in the House Demonstrates that the Act was not Intended to Apply to Cases such as This.

The preceding assertion receives ample support from the Report of the House Judiciary Committee. Rep. Drinan, the primary author of that Report, commented that lower courts, prior to the "*Alyeska*" decision, had allowed attorney's fees to be awarded in civil rights cases when private attorneys general aided in "eliminating discriminatory practices adversely affecting all citizens, white and non-white[30]." Rep. Drinan identified examples of the types of § 1983 actions to which the Fees Act would apply[31]:

> § 1983 is utilized to challenge: official discrimination, such as racial segregation imposed by law. *Brown v. Board of Education*, 347 U.S. 483 (1954); [U]nlawful official action in non-racial matters (the imposition of a poll tax). *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966); . . . unconstitutional search of a private residence. *Monroe v. Pape*, 365 U.S. 167 (1961); discrimination on account of political affiliation in public employment. *Elrod v. Burns*, 427 U.S. 347, (1976); terms and conditions of institutional confinement. *O'Connor v. Donaldson*, 442 U.S. 563 (1975).

[29] *Terry v. Elmwood Cemetery*, 307 F. Supp. 369 (N.D. Ala. 1969); *Ford v. White*, 430 F.2d 951 (5th Cir. 1970); *Lyle v. Teresi*, 327 F. Supp. 683 (D. Minn. 1971); *Blumenthal v. Lee Memorial Hospital*, (E.D. Ark. 1971); *La Raza Unida v. Volpe*, 57 F.R.D. 94 (N.D. Cal. 1973); *Hammond v. Housing Authority*, 328 F. Supp. 586 (D. Ore. 1971); *Taylor v. City of Millington*, 476 F.2d 599 (6th Cir. 1973); *Downs v. Department of Public Welfare*, 65 F.R.D. 557 (E.D. Pa. 1974). The above cited cases were cited at 122 Cong. Rec. 33314 (1976).

[30] H. Rep. No. 94-1558, 94th Cong., 2d Sess. at 2 (1976).

[31] *Id.* at 4, 5.

In addition, the House Judiciary Report noted that some lower courts had awarded attorney's fees in cases joining federal statutory claims with constitutional claims. The Report subsequently provided a relevant example in which two standards were delineated in order to assist in a determination of the applicability of the Fees Awards Act. Commenting thereon, the Committee said[32]:

> To the extent a plaintiff joins a claim under one of the statutes enumerated in H.R. 15460 with a claim that does not allow attorney fees, that plaintiff, if it prevails on the non-fee claim, is entitled to a *determination on the other claim* for the purpose of awarding counsel fees. *Morales v. Haines*, 486 F.2d 880 (7th Cir. 1973). In some instances, however, the claim with fees may involve a constitutional question which the courts are reluctant to resolve if the non-constitutional claim is dispositive. *Hagans v. Lavine*, 415 U.S. 528 (1974). In such cases, if the claim for which

[32] *Id.* at 4, n. 7.

> fees *may be awarded meets* the "*substantiality*" *test*, see *Hagans v. Lavine, supra*; *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966), attorney's fees may be allowed even though the court declines to enter judgment for the plaintiff on that claim, so long as the plaintiff prevails on the non-fee claim arising out of a 'common nucleus of operative fact.' *United Mine Workers v. Gibbs, supra*, at 725. (*Emphasis added.*)

Respondents Thiboutot are not entitled to an award of fees regardless of which of the two above noted standards are applied. If *Morales* is followed[33], there can be "no determination on the other claim for the purpose of awarding counsel fees" because there was no other claim involved. If *Hagans* is invoked, the same result occurs, "as the claim for which fees may be awarded" did not meet the "substantiality" test. (*Opinion Supreme Judicial Court, paragraph* 8, *A*.56.)

Additional specific examples of the intended application of the Fees Act were enumerated in the House debates. Rep. Kastenmeier, Chairman of the Subcommittee on Courts, Civil Liberties and Administration, listed cases, remarkably similar to those noted by Sen. Kennedy[34], to which the Fees Act would apply[35]. Rep. Fish, while referring to the predecessor of § 1983, stated that the Act would affect, *inter alia*, "[s]uits under section 1979 of the Revised Statutes by blacks

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[33] *Morales* concerned allegations in the area of federal subsidized housing in which the presence or absence of racial discrimination was crucial to the determination as to whether or not attorney's fees were to be allowed.

[34] *Supra* at 21-22, n.29.

[35] 122 Cong. Rec. 35126.

denied employment by the State Highway Safety Patrol on the basis of race[36]." Both Reps. Holtzmann and Seiberling stated that a dual function of the Act was to provide for protection of constitutional rights as well as to serve as a combatant against discrimination[37]. Although many more examples could be listed, suffice it to say that these debates offer further evidence that the purpose of the Fees Act was to award attorney's fees for actions involving fundamental civil rights.

Finally, it is of import to note that, at the time of the House subcommittee hearings in 1975 dealing with attorney's fees, three bills were pending in Congress which dealt "expressly with counsel fees in civil rights cases[38]." One such bill, H.R. 7969[39], was introduced by

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[36] *Id.*

[37] *Id.* at 35127.

[38] H. Rep. No. 94-1558, 94th Cong., 2d Sess. at 2 (1976).

[39] H. R. 7969, In the House of Representatives. Drinan (for himself, Mr. Rodino, and Mr. Edwards of California) introduced the following bill; which was referred to the Committee on the Judiciary

A BILL to amend the Civil Rights Act of 1964 to provide reasonable attorney fees in cases involving civil and constitutional rights.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That title XI of the Civil Rights Act of 1964 is amended by adding at the end the following new section:

"SEC. 1107. In any civil action to recover damages or to secure equitable or other relief under the Constitution, or any provision of law which provides for the protection of civil or constitutional rights, the court in its discretion may allow the prevailing party other than a governmental entity or any officer thereof acting in an official capacity, reasonable attorney fees as part of the costs, and the governmental entity or officer shall be liable for such costs and fees the same as a private person."

Rep. Drinan, who, while referring to attorney's fees in the House Report, stated that the bill "would permit such awards in any case involving civil or constitutional rights, *no matter what the source of the claim.*" (*Emphasis added*[40].) In contrast, Rep. Drinan said that H.R. 9552 (the predecessor of the Fees Act)[41] would authorize only the awarding of fees brought under specific provisions of the United States Code. From Rep. Drinan's conclusion, it is plain that the source of the claim is relevant and would most certainly affect the validity of an attorney's fees demand based on the Social Security Act. It is, therefore, apparent from the Congressional history of the Fees Act that it was not intended to apply to cases such as this wherein no civil or constitutional rights were violated.

C. Congress Did Not Intend to Authorize an Award of Attorney's Fees for an Error in the Interpretation of the Social Security Act.

The fact that the Fees Act was limited primarily to cases arising under the civil rights laws without mention of the Social Security Act supports the argument that Congress did not intend for fees to be awarded for good faith violations of the latter statute. While the Fees Act was intended to aid enforcement of civil rights, it can hardly be said that the Social Security Act or the AFDC provisions therein were designed to provide for civil rights.

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[40] H. Rep. *supra* at 3, see 121 Cong. Rec. 28742 (1975).

[41] Later passed as H.R. 15460 with amendments to comply with S. 2278, the Senate version which was adopted as Pub. L. 94-559 (Fees Act).

Additionally, there are no "specific and explicit provisions for the allowance of attorneys' fees[42]" for violations of the Social Security Act contained within the Fees Act. Certainly, Congress could have amended § 602(a)(7) of the former to include a fees provision had it so desired, much as it has done in every major civil rights law passed or amended by that body since 1964[43]. In connection therewith, it is important to note that Congress did see fit to amend § 406(b)(1) of the Social Security Act in 1965 and again in 1968[44]. This amended legislation enabled attorneys, in certain restricted situations, to receive fees for successfully representing their clients. Had Congress desired to provide similarly or more expansively for attorneys representing AFDC recipients, it presumably would have done so.

Of course, Congress may well have been aware of the effect that an amendment to the Social Security Act allowing attorney's fees in actions such as the one at bar would have on individual states. For example, the threat of an award of fees for a good faith error in judgment would have a chilling effect on literally hundreds of decisions made every year in each state of the union by welfare program administrators. Also, fees so awarded would, in some instances, be an unforeseen expenditure from state treasuries, thereby imposing a further strain on already limited budgets. Naturally, this would result in less funds being available for other beneficial programs, thereby adding to the deleterious effects that awards of attorney's fees would have if

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[42] *Alyeska Pipeline Services Company v. Wilderness Society*, 421 U.S. 240, 260 (1975).

[43] S. Rep. No. 94-1011, 94th Cong., 2d Sess., *reprinted in* [1976] *U.S. Code Cong. and Ad. News* 5911 at 3.

[44] Pub. L. 89-97, Pub. L. 90-248 (providing, *inter alia*, for fixing of attorney's fees for claimants).

deemed to be authorized by violations of the Social Security Act.

The preceding statements, however, are not to be read as asserting that section 1983 and the Fees Act are inapplicable to *any* action arising out of the Social Security Act. To the contrary, petitioners acknowledge that a denial of Social Security Act benefits based upon unlawful discrimination concerning a person's sex, race or religion could amount to a deprivation of rights within the contemplation of 42 U.S.C. § 1983 and the Attorney's Fees Awards Act. However, in order to determine whether a "civil" or Constitutional right is at issue in any particular case, a court should look not necessarily to the statute involved, but rather to the nature of the defendant's conduct. Certainly, if respondents had their welfare benefits reduced in this case due to their ethnic background, attorney's fees would be proper pursuant to § 1983 and the Fees Act. Conversely, if no Constitutional or fundamental civil rights are at issue, then § 1983 and the Fees Act are inapplicable.

III.

FEDERAL COURTS HAVE EXCLUSIVE JURISDICTION OF 42 U.S.C. § 1983 CLAIMS.

The history of the Civil Rights Act of 1871 does not disclose any intent by the United States Congress to grant jurisdiction to state courts concurrent with their federal counterparts. "It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts." *Monroe v. Pape*, 365 U.S. at 180. (1961). Mr. Justice Harlan, in his concurring opinion in *Monroe*, quoted Senator Frelinghuysen as saying " . . . the injured party should have

an original action in our Federal courts . . . " *Id.* at 197. *Carey v. Piphus*, 435 U.S. 247, 255-56 n.9 (1978), in quoting an opponent of section 1 of the Civil Rights Act of 1871, serves to bolster the above argument: " . . . [A]nd yet by this section jurisdiction of that civil action is given to the Federal courts instead of its being prosecuted as now in the courts of the State." The background of § 1983 was also discussed in *Mitchum v. Foster*, 407 U.S. 225, 238 (1971). Besides stressing that it was enacted to enforce the Fourteenth Amendment provisions, Senator Osborne was quoted in *Mitchum* as saying " . . . and the courts with reference to which we legislate must be the United States courts." *Id.* at 242. *Mitchum* also makes clear that the very purpose for which § 1983 was enacted was to serve as guardian for the citizenry's federal rights by placing the Federal courts between the States and the people. *Id.* In view of the social conditions which existed at the time of the enactment of the Civil Rights Act of 1866, as well as the specific lack of any mention of intended application of that Act and its progeny to state courts, it is doubtful whether § 1983 may be enforced in state courts.

CONCLUSION

For the foregoing reasons the decision of the Maine Supreme Judicial Court must be reversed.

Respectfully submitted,

RICHARD S. COHEN
Attorney General
of the State of Maine

JAMES EASTMAN SMITH
Assistant Attorney General
of the State of Maine

FOR ARGUMENT

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-838

STATE OF MAINE AND MICHAEL R. PETIT, COMMISSIONER OF THE DEPARTMENT OF HUMAN SERVICES, STATE OF MAINE,

Petitioners,

v.

JOLINE THIBOUTOT AND LIONEL THIBOUTOT, AND ON BEHALF OF OTHERS SIMILARLY SITUATED,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE STATE OF MAINE

BRIEF OF RESPONDENTS

Hugh Calkins
Calkins & Wuesthoff
97A Exchange Street
Portland, Maine 04101

Howard H. Dana, Jr.
Verrill & Dana
Two Canal Plaza
Portland, Maine 04112

Robert Edmond Mittel
Sewall & Mittel
178 Middle Street
Portland, Maine 04112

Susan Calkins
Pine Tree Legal Assistance, Inc.
146 Middle Street
Portland, Maine 04101

Counsel for Respondents

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

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IN THE

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Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE STATE OF MAINE

BRIEF OF RESPONDENTS

Questions Presented

Was the Maine Supreme Judicial Court in error when it interpreted 42 U.S.C. §1983 to provide a cause of action for a violation of the "laws" of the United States, to wit, 42 U.S.C. §602(a)(7), a portion of the Social Security Act relating to Aid to Families with Dependent Children?

Was the Maine Supreme Judicial Court in error when it ruled that 42 U.S.C. §1988 authorized an award of attorney's fees in an action in which the trial court ruled in favor of respondents but found no violation of respondents' constitutional rights?

Statement

This is an action brought by a class of families who receive AFDC[1] benefits to enforce rights guaranteed to them by the Social Security Act. The plaintiffs (hereafter referred to as "respondents") made no claim that any rights secured by the Constitution were at issue (A. 7-9 and 11-15). The action was filed in the Maine Superior Court in April, 1976 (A. 9); that court issued an injunction on July 14, 1977 requiring the State of Maine (hereafter the "State") to change its AFDC regulation to conform to the Social Security Act (A. 31-32). The Superior Court denied respondents' request for an award of retroactive AFDC benefits for the unnamed class members and also denied their request for attorney's fees (A. 43-44).

The respondents appealed to the Supreme Judicial Court of Maine. The Superior Court judgment was affirmed in part and reversed in part. The State was ordered to pay respondents' attorney's fees. The State filed a petition for a writ of certiorari which was granted on January 21, 1980. *Maine v. Thiboutot*, U.S. , 100 S.Ct. 727 (1980).

The family of Lionel and Joline Thiboutot, the respondents, includes eight children: four by both Lionel and Joline, one by Joline but not Lionel, and three by Lionel but

[1]Aid to Families with Dependent Children. 42 U.S.C. § § 601 *et seq.*; Me. Rev. Stat. tit. 22, §3741.

not Joline. In November, 1975 the respondents were notified by the State of a reduction in their AFDC benefits.[2] Prior to the change the respondents had income from two sources: Lionel earned $490.00 per month as a truck driver, a job he had held for ten years (A. 23). The family also received an AFDC grant of $342.00 per month (A. 8). The respondents had $832.00 per month with which to shelter, feed and clothe their family of ten, including eight growing children.

The reduction in AFDC benefits was determined as follows: In computing the available income of Lionel, the State would no longer subtract from the total family income that portion of Lionel's income which was needed to shelter, feed and clothe the four chidren of both Lionel and Joline (those children not being eligible for AFDC benefits),[3] although Lionel was required by law to support those children and in fact did support them. Respondents argued successfully that the reduction ignored reality and treated, as available, income which was not available under the Social Security Act. 42 U.S.C. §602(a)(7).

Correct application of the Social Security Act to respondents generates approximately $340.00 per month for them in additional AFDC benefits thereby increasing their total income (A. 46). The other class members received similar increases in benefits. The Thiboutots also received a

[2]There is no support in the record for the State's assertion that HEW required it to reduce respondents' benefits. Brief of State, 5. The State has argued that its violation of respondents' rights was in good faith. Brief of State, 7, 14, 18, 26 and 27. But that argument is unsupported by the record and, in any event, avails the State nothing as respondents sought only injunctive and declaratory relief.

[3]The four mutual children were not deprived of parental support and, therefore did not meet the requirement of dependency. 42 U.S.C. §606(a).

retroactive award of approximately $3,000.

Throughout most of the litigation respondents have been represented by counsel who is a member of a small law firm. After obtaining the injunction against enforcement of the unlawful State regulation respondents sought attorney's fees in the amount of $5,622.06 (A. 37-38). The State has never argued that respondents sought an unreasonable amount of fees; rather they have argued that no fees should be allowed.

Summary of Argument

The basic issue in this case is whether persons whose federal statutory rights have been violated by others acting under color of state law can go to court for redress of those violations. As set forth above, respondents are persons of low income. That fact alone indicates their inability to pay the costs, including attorneys' fees, of going to court. Congress, knowing that attorneys' fees are often a substantial deterrent to the private enforcement of federal rights, provided for the payment of prevailing parties' attorneys' fees. Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. §1988. Thus, the Maine Supreme Judicial Court held that respondents were entitled to have their attorneys' fees paid for by the State because respondents successfully enforced their rights under the Social Security Act in court. Respondents' litigation "led to the correction of an erroneous state welfare rule with resulting long-term benefits to an indeterminate class of present and future AFDC recipients." (A. 65, Opinion, Maine Supreme Judicial Court). The State has requested this Court to reverse the holding of the Court below.

Because the Fees Act is applicable, by its terms, to actions brought pursuant to 42 U.S.C. §1983, this Court has been asked by the State to review whether the Maine Supreme Judicial Court erred in finding that this case is properly a §1983 action. The threshold issue is, therefore, whether §1983 provides a cause of action for violations of federal statutory rights.

I. Respondents stated a cause of action pursuant to 42 U.S.C. §1983 because that section applies to deprivations, under color of state law, of rights secured by "laws". The State violated respondents' rights under the Social Security Act.

In this Court the State argues that §1983 does not apply to deprivations of federal statutory rights unless the statute is one providing for equal or civil rights. The State would have this Court interpret the phrase "Constitution and laws" as used in the civil rights statutes to mean other than what it says.

In cases of statutory interpretation the Court must look first to the plain wording of the statute. *Caminetti v. United States,* 242 U.S. 470 (1917). As long as the meaning is plain, the courts cannot look behind the statute or search for an ambiguity in its antecedents. *United States v. Bowen,* 100 U.S. 508 (1879). Section 1983 is not ambiguous; it states that any person who, under color of law, subjects any person to the deprivation of rights secured by the "Constitution and laws" shall be liable to the injured party.

Even if this Court goes beyond the plain meaning of §1983 and looks at the other civil rights statutes enacted in the Revised Statutes of 1874, it will see that five out of the six general civil rights statutes, including §1983, utilized the phrase Constitution and laws and in only one is the phrase modified by the addition of the words "providing for equal

rights", R.S. 629(16) (now 28 U.S.C. §1343(3)). Furthermore, a review of §1983 and the other statutes demonstrates that Congress intended the words "Constitution and laws" to have the same scope and meaning as those words have in the Supremacy Clause.

Although resort to legislative history is unnecessary since there is no ambiguity in §1983, that complex history reveals that Congress recognized the difference between the phrase "Constitution and laws" and the phrase "Constitution and laws providing for equal rights." Congress consciously chose to use the former phrase in §1983 (then R.S. 1979) and four other statutes but chose to use the latter phrase in only one of the relevant Revised Statutes in 1874. See the attached statutory derivation chart.

This Court held in *United States v. Price*, 383 U.S. 787 (1966), and similar cases, that civil rights statutes are to be given their broad and literal meaning. To read §1983 as the State suggests is to ignore a large number of statutory §1983 cases decided in this Court and in the lower federal courts. *Edelman v. Jordan*, 415 U.S. 651 (1974); *Randall v. Goldmark*, 495 F.2d 356 (1st Cir. 1974). This Court has stated that "suits in federal court under §1983 are proper to secure compliance with provisions of the Social Security Act on the part of participating states." *Edelman v. Jordan, supra* at 675.

In addition to examining the words of §1983 and the relevant case law, this Court should consider that a ruling favorable to the respondents will preserve federalism within the judicial system by directing most statutory §1983 litigation to state courts. An analysis of available statistics shows that this court need not be concerned about "opening the floodgates" if it affirms the judgment of the Maine Supreme Judicial Court.

II. If this Court finds, as respondents believe it must, that §1983 provides a cause of action for deprivations, under color of state law, of federal statutory rights, then this Court must also conclude necessarily that the Maine Supreme Judicial Court was correct in its holding as to the Fees Act, 42 U.S.C. §1988. Like §1983, the Fees Act is without ambiguity. It allows courts to award attorneys' fees to prevailing parties in any §1983 action, constitutional or statutory, in federal or state court. The broad application of the Fees Act was intended by Congress, and this Court has held the application of the Fees Act against state defendants was within the power of Congress. *Hutto v. Finney*, 437 U.S. 678, 693-694 (1978).

The purpose of the Fees Act is to provide for the private enforcement of the civil rights acts. S. Rep. 94-1011, 94th Cong., 2d Sess. 2; 1976 U.S. Code, Cong. & Ad. News 5908, 5909-5910. An award of fees to respondents will encourage and implement this clearly stated Congressional policy. It will also encourage litigants to choose state courts.

Argument

I.

RESPONDENTS HAVE PROPERLY ASSERTED A CAUSE OF ACTION UNDER 42 U.S.C. §1983 AS THEY SOUGHT TO ENFORCE RIGHTS SECURED BY A FEDERAL LAW.

A. Section 1983 Provides a Cause of Action for Interference With Any Right Secured by a Federal Statute.

1. The Plain Meaning of 42 U.S.C. §1983 Requires Its Application to Statutory Claims.

Maine's welfare regulations deprived the respondents of a right secured by 42 U.S.C. §602(a)(7). Respondents believe that the plain meaning of §1983 allows them to assert a cause of action for that deprivation of a federal statutory right. The State of Maine contends that §1983 should be interpreted to contain additional limiting language.[4]

Section 1983 is clear and unambiguous on its face. It reads:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

While in all cases of statutory construction, the task of the court is to interpret the words of the statute in light of the

[4]Much of the argument of the State appears to rely on the concurring opinion of Mr. Justice Powell in *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 623 (1979). Justice Powell suggests in *Chapman* that the words "Constitution and laws," should be read "Constitution and laws providing for equal rights." *Id.* at 637 n. 20, 645-646. The State, while never clearly setting forth the interpretation it feels should be given to the statute, indicates in its summary of argument that the words to be engrafted are "civil rights," thus making §1983 read "Constitution and civil rights laws," or "Constitution and laws providing for civil rights." Brief of State, 8.

purposes Congress sought to serve,[5] "the meaning of the statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, . . . the sole function of the courts is to enforce it according to its terms."[6] This language has been referred to as a classic expression of the plain meaning rule.[7]

There is no ambiguity in §1983. It applies to "laws" without modification. A review of the other relevant civil rights statutes shows that the plain meaning of §1983 is consistent with the language and meaning of those statutes.

R.S. 1979 (now §1983) was first enacted in its present form in 1874.[8] In 1874 six related statutory provisions including R.S. 1979 were enacted as part of the Revised Statutes:[9]

(1) R.S. 1979 provided a civil action for persons whose rights secured by the Constitution and laws were violated under color of state law. (2) R.S. 5510 (now 18 U.S.C. §242) punished criminal conduct, committed under color of state law, which interfered with rights secured or protected by the Constitution and laws of the United States.

(3) R.S. 5508 (now 18 U.S.C. §241) punished criminal conspiracies interfering with rights secured by the Con-

[5]*Chapman v. Houston Welfare Rights Organization, supra* at 608.

[6]*Caminetti v. United States*, 242 U.S. 470 (1917); *see also* 2A C. Sands, *Sutherland's Statutory Construction* §46.01 (1973) (hereafter C. Sands).

[7]C. Sands, *supra* n. 7.

[8]Citations to the Revised Statutes of 1874 are R.S.

[9]At that time two statutes providing substantive rights were also enacted as part of the Revised Statutes. Those sections were R.S. 1977 and 1978 (now 42 U.S.C. §§1981 and 1982). A more thorough discussion of the history of all these statutes can be found below at 18-24.

The various civil rights statutes are set forth in the statutory derivation chart attached to this brief.

stitution or laws of the United States.

(4) R.S. 563(12) provided district court jurisdiction of actions authorized by law to redress deprivations, under color of state law, of rights secured by the Constitution or by any law.

(5) R.S. 629(16) provided circuit court jurisdiction of actions authorized by law to redress deprivations, under color of state law, of rights secured by the Constitution or rights secured by any law providing for equal rights.[10]

(6) R.S. 722 (now 42 U.S.C. §1988) provided that, in civil rights actions, where federal remedial law was deficient state remedial law was to be applied so long as it was consistent with the Constitution and laws.

With the adoption of the Revised Statutes five of the six general sections applied to all constitutional provisions and all statutory provisions. R.S. 1979, 5510, 5508, 563(12) and 722. Only R.S. 629(16) was limited by its language to a lesser scope. It is difficult to believe that Congress intended to limit the five sections with the language of a sixth when it did not so state.[11] No modifier is present and nothing suggests any restriction on the scope of the words "Constitution and laws". *See, Lewis v. United States,* U.S. , 48 U.S.L.W. 4205, 4207 (1980). Thus, R.S. 1979 (now §1983) should be interpreted to mean what it says.[12]

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[10]R.S. 563(12) and R.S. 629(16) were merged in 1911 with enactment of the Judicial Code. Circuit courts were abolished, and district courts were given jurisdiction of civil actions redressing deprivations under color of law of rights secured by the Constitution and laws providing for equal rights. Judicial Code of 1911, § §24(14) and 289, 36 Stat. 1087, 1092, 1167 (now 28 U.S.C. §1343(3)).

[11]A similar example can be found in the removal statutes. *Compare* R.S. 640 *with* R.S. 641.

[12]In concentrating on the language "Constitution and laws" it is easy to lose sight of a significant limitation on the scope of R.S. 1979: it

(continued)

An interpretation limiting the meaning of "Constitution and laws" to "Constitution and laws providing for equal rights" creates an anomalous result. If so limited, it would at the time of its enactment merely have given a statutory cause of action for violations of R.S. 1977 and 1978 (now 42 U.S.C. § §1981 and 1982). However, the common antecedent of R.S. 1977 and 1978 (§1 of the 1866 Act) had already been interpreted to provide a remedy for its violation. *Live Stock, & Association v. Crescent City & Co.*, 15 F. Cas. 649, 655 (5th Cir. 1870). In 1874 there were no other federal equal rights statutes to which R.S. 1979 could have applied if so interpreted. Congress cannot be presumed to have placed words in a statute which would have no purpose or meaning.

A further anomaly that follows from the State's argument is that in R.S. 5508 the same words must have a different meaning where they appear at different places in the same sentence. The first time the phrase "Constitution or laws" appears it is used in the same context as it is used in R.S. 1979, that is, speaking of rights secured by the Constitution and laws. However, the phrase "Constitution or laws" appears again in the same sentence stating that persons who are convicted of conspiring to deprive others of their rights can be punished by being forever ineligible for any office or honor provided by the "Constitution or laws". Obviously, the addition of the phrase "providing for equal rights" would

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(footnote continued from preceding page)

applies only to actions under color of state law. The amici appear to have made that mistake. Brief of Amici, 11. The statute is designed to provide citizens with a full arsenal of remedies for combatting governmental misconduct. Congress can and has excluded certain statutes from the scope of §1983. It has done so expressly, *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970), and impliedly, *compare Great American Federal Savings & Loan Association v. Novotny*, 442 U.S. 366 (1979) (referring to §1985) *with Rosado v. Wyman*, 397 U.S. 397 (1970).

make no sense whatsoever in the latter context. It is difficult to assume that Congress used a phrase twice in the same sentence in the same statute intending it to have two meanings.[13]

R.S. 1979 was different from the statute on which it was based. That statute protected rights secured by the Constitution. Act of April 20, 1871, §1, 17 Stat. 13. However, this Court on many occasions in the years following the enactment of the Revised Statutes has refused to alter statutes when the meaning was plain even though the plain meaning differed from the meaning of the prior acts on which they were based. In *United States v. Bowen*, 100 U.S. 508, 513 (1879), the rule was stated:

> When the meaning is plain, the courts cannot look to the statutes which have been revised to see if Congress erred in that revision, but may do so when necessary to construe doubtful language used in expressing the meaning of Congress.[14]

The plain meaning rule does not allow words to be added to a statute which have never before existed in the statute. This rule prevents this Court from going beyond the plain meaning of 42 U.S.C. §1983 (R.S. 1979) to supply language restricting and limiting its meaning. Although courts in some instances have supplied words in construing statutory language, it is said to be "a power which is exercised with unusual caution." The general rule is that "[w]ords may not be supplied in a statute where the statute is intelligible without the addition of the alleged omission. . . ."

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[13]*See also* R.S. 722 (42 U.S.C. §1988) in which "Constitution and laws" would be meaningless if limited as the State argues.

[14]There are numerous cases expressing the same principle with respect to the Revised Statutes of 1874. *See, e.g., Hamilton v. Rathbone*, 175 U.S. 414 (1899) and the cases cited therein.

."[15] That rule should not be ignored here. This is not one of those "rare and exceptional circumstances" where the letter of the statute should not prevail. *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 187 n. 33 (1978).

2. Congress Intended §1983 to Provide a Cause of Action for Deprivation of Any Federal Statutory Right.

It is "[a] fundamental canon of statutory construction . . . that unless otherwise defined words will be interpreted as taking their ordinary, contemporary, common meaning." *Perrin v. United States*, U.S. , 100 S.Ct. 311, 314 (1979). In 1874, and indeed from the time of the drafting of the Constitution to the present, the phrase "Constitution and laws" had a plain, clearly and commonly understood meaning. That meaning is coextensive with the scope of the judicial power granted by Article III, §2 of the Constitution, and the Supremacy Clause in Article VI, cl. 2. Those provisions read, in pertinent part, respectively:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties . . . .
>
> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme law of the Land . . . .

Alexander Hamilton in the Federalist papers used the phrase referring to the full extent of the Constitution and all statutes of the United States.[16] In 1801 Congress enacted a

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[15]2A. C. Sands, §47.38 (1973).

[16]"What equitable causes can grow out of the Constitution and laws of the United States?" The Federalist No. 80 (539 J. Cooke ed. 1961); *see also* The Federalist No. 78 (529 J. Cooke ed. 1961).

short-lived predecessor to the present federal question jurisdiction statute, 28 U.S.C. §1331. That statute (as does §1331) used the phrase "Constitution and laws" to describe all the provision of the Constitution and all the laws.[17]

In *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 426 (1819), Chief Justice Marshall said of the Supremacy Clause, "the constitution and laws made in pursuance thereof are supreme; . . . they control the constitution and laws of the respective states, and cannot be controlled by them." In *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 391-392 (1821)[18] he used the phrase to describe the judicial power granted by Article III:

> If the constitution or laws may be violated by proceedings instituted by a State against its own citizens, and if that violation may be such as essentially to affect the constitution and laws . . . why should these cases be excepted from that provision which expressly extends the judicial power of the Union to all cases arising under the constitution and laws?

During the debates on the reconstruction era legislation, there were many references to such cases as *Cohens, supra*, and the Supremacy Clause generally.[19] Looking back on the reconstruction era, the Speaker of the House during much of that time said the following:

> The presumption was that these states would be obedient to the Constitution and laws. But for this

[17]Act of Feb. 13, 1801, §11, 2 Stat. 89, 92; repealed Act of March 8, 1802, §1, 2 Stat. 132.

[18]*See also Dodge v. Woolsley*, 59 U.S. (18 How.) 331, 353, 355, 358 (1855).

[19]President's Annual Message to Congress, Cong. Globe, 42nd Cong. 2nd Sess. 4, 6 (1871); Remarks of Senator Edmunds, Cong. Globe, 42nd Cong., 1st Sess. 692 (1871); Remarks of Representative Bingham, Cong. Globe, 42nd Cong., 1st Sess. App. 81 (1871).

> presumption, legislation would be but idle play, and a government of laws would degenerate at once into a government of force. . . . And if the presumption of obedience with respect to statute law be general, much stronger should it be with respect to organic law, upon which the entire structure of free government is founded. . . .
>
> But it was soon disclosed that on the part of the large mass of those who had participated in the rebellion, properly speaking, indeed, on the part of the vast majority of the white men of the South, there was really no intention to acquiesce in the legislation of Congress, no purpose to abide by the Constitutional Amendments in good faith. . . . 2 J. Blaine, *Twenty Years of Congress*, 466-467 (1884).

It has been suggested that these references support an argument that the passage of the reconstruction era statutes and constitutional amendments were part of a movement to clearly establish the primacy of the national government in all spheres.[20] While that argument is persuasive, it is not necessary for this Court to consider it since the members of Congress in 1874 knew and understood the meaning of the phrase "Constitution and laws" because of its widespread use. That meaning as set forth in R.S. 563(12), 722, 1979, 5508 and 5510 was and is: all the provisions of the United States Constitution and all the laws of the United States.

[20]*Mitchum v. Foster*, 407 U.S. 225, 238-39 (1972); F. Frankfurter and J. Landis, *The Business of the Supreme Court*, 85 n. 135 (1928); E. Gressman, *The Unhappy History of Civil Rights Legislation*, 50 *Mich. L. Rev.* 1323, 1323-24 (1950). Representative Brooks, an opponent of reconstruction, likened the supporters of reconstruction to Federalists of 1800 and said:

> They have no idea of local, State, county, or municipal government. They know nothing but the Federal sword. Cong. Globe, 42nd Cong., 1st Sess. 790 (1871).

3. The Legislative History of the Revised Statutes Supports Respondents' Position.

In his concurring opinion in *Chapman*, Justice Powell explored the legislative history of the relevant provisions of the Revised Statutes. He focused on R.S. 563(12) and 629(16) and said that the broader language in R.S. 563(12) meant the same as the narrower language in R.S. 629(16). He then said that the language of R.S. 1979 and 5510 is likewise to be read as having the narrower meaning of R.S. 629(16). He attributed the difference in language to an oversight by Congress caused by the use of the multiple drafters of the Revised Statutes.[21] His interpretation is erroneous for a number of reasons.

The Congress that enacted the Revised Statutes knew that some changes were unavoidable and that others were desired, notwithstanding the general desire to effect no changes. 2 Cong. Rec. 650 (1874). However, it expressed itself with certainty as to the result of any changes which were made. R.S. 5596 repealed all earlier laws which formed the basis for laws which had been enacted in the revision; R.S. 5595 made the Revised Statutes positive law.[22] Thus, §1 of the 1871 Act was repealed and R.S. 1979 became the law.

When it discovered erroneous or incomplete language in the Revised Statutes, Congress had at least three opportunities to change that language. The first two opportunities were errors and omission bills which altogether

[21]441 U.S. at 634-635 and n. 15.

[22]Congress did not adopt a proposal offered by Representative Willard which would have had the opposite effect: any provision of the Revised Statutes which changed an earlier version of a law would be controlled by the earlier version. 2 Cong. Rec. 648 (1874); *see also Hamilton v. Rathbone*, 175 U.S. 414 (1899) and *United States v. Bowen*, 100 U.S. 508 (1879).

made some 252 changes including two in R.S. 563 and one in R.S. 629. 18 Stat. 1433-36 (Part 1); 19 Stat. 240. R. Dwan & E. Feidler, *The Federal Statutes - Their History and Use*, 22 *Minn. L. Rev.* 1008, 1014 (1938). The statutes were revised in full a second time in 1878. M. Price and H. Bitner, *Effective Legal Research* 29 (1969). Congress did not avail itself of these three opportunities to modify the language of R.S. 563(12), 1979, 5508 or 5510 to conform those sections to the scope of R.S. 629(16).[23]

Prior to Congressional consideration of the Revised Statutes there had been numerous opportunities for members of the public and Congress to suggest corrections in the 1872 Draft of the Revised Statutes[24] which formed the basis for the Revised Statutes.[25] As far as respondents can determine no changes were suggested or adopted to conform any of the relevant provisions to the language of R.S. 629(16).

A close analysis of the original civil rights acts, the 1872 Draft and the Revised Statutes shows that §1983 (R.S. 1979) allows a cause of action to be asserted for violation of

[23]In 1909 Congress codified the criminal statutes and made some minor revision in R.S. 5508 and 5510. 35 Stat. 1092. No changes were made respecting the scope of either of those statutes. This action was taken with the presumed knowledge of *United States v. Waddell*, 112 U.S. 76 (1884), which held that R.S. 5508 applied to all federal statutes.

[24]Respondents cite, only where necessary, to the 1973 Jacobstein and Mersky reprint of the 1872 Draft, by title, chapter and section. Otherwise, they refer to the appropriate United States Code or Revised Statute citation.

[25]In 1872 Thomas Jefferson Durant was assigned the task of correcting the revisers' errors. 2 Cong. Rec. 646 (1874). Experts in the field had access to the Draft. Sen. Misc. Doc. 3, 42nd Cong., 2nd Sess. 3 (1871). Members of Congress with special expertise in particular areas were encouraged to review titles in which they were interested. 2 Cong. Rec. 650 (1874).

any federal statute under color of state law.[26] As noted above at page 10, five of the six statutes dealing generally with civil rights,spoke in the language of the Supremacy Clause.[27]

Congress while considering the Revised Statutes was confronted with two different choices of language when enacting R.S. 5510. In the 1870 Act, §17 (the predecessor of R.S. 5510 and 18 U.S.C. §242) applied to deprivations of rights secured by "the last preceding section"; the only rights secured by "the last preceding section" were equal rights. Obviously, new language had to replace "the last preceding section". Congress could have chosen to have the scope of R.S. 5510 parallel the narrow, "equal rights" language of R.S. 629(16). In the 1870 Act, §6 (the predecessor of R.S. 5508 and 18 U.S.C. §241) applied to deprivations of rights secured by the Constitution or laws. Congress could have chosen to have the scope of R.S. 5510 parallel the broad "Constitution or laws" language of R.S. 5508. It made the latter, broader choice with the knowledge and ability to choose the narrow language option. It consciously rejected the possibility of having R.S. 5510 apply only to those statutes which protected equal rights.

The intent of Congress to give R.S. 5510 a broad, rather than a narrow, meaning is reinforced by a review of the change in its language from the 1872 Draft. Section 190 of that Draft (the revisers' draft of §2 of the Act of 1866 and §17 of 1870 Act and forerunner of R.S. 5510) focused on a

[26]For the following discussion reference to the Statutory Derivation Chart is particularly helpful.

[27]R.S. 1977 and 1978 (now 42 U.S.C. §§1981 and 1982) are equal rights statutes. Their distant predecessor was §1 of the Act of April 9, 1866, 14 Stat. 27, which was substantially re-enacted by §16 of the Act of May 31, 1870, 16 Stat. 140, 144. It is those sections, which provide substantive rights, in the nature of equal rights, to which the general civil rights statutes initially referred. Act of 1866, §§2 and 3, 14 Stat. 27; Act of 1870, §17, 16 Stat. 140, 144.

deprivation of equal rights.[28] However, when §5510 was enacted by Congress in 1874 the focus was on a deprivation of rights secured by the "Constitution and laws". The change in language from the Draft to the Revised Statutes is substantial and illustrates the knowing choice that Congress made to broaden the coverage of R.S. 5510 (18 U.S.C. §242).

The antecedent of R.S. 563(12) and 629(16) (§3 of the 1866 Act) initially provided jurisdiction only for cases involving equal treatment of blacks, arising from §§1 and 2 of the 1866 Act. As R.S. 563(12), §3 was also changed to parallel R.S. 5508. It expanded the jurisdiction of the district court to include cases involving all constitutional claims and all statutory claims where the defendants had acted under color of state law. As a result of the revision, only R.S. 629(16) (also derived from §3) did not parallel the scope of R.S. 5508. It gave jurisdiction to the circuit court for all Constitutional claims but only for statutory claims where equal rights were involved, each requiring defendants to have acted under color of state law.[29]

Congress knew it was broadening the scope of §1 of the 1871 Act (R.S. 1979, §1983) and knew that it would apply to all statutory causes of action. Representative Lawrence discussed that change by referring to the fact that R.S. 5510 (now 18 U.S.C. §242) would be applied more broadly than its predecessor, §17 of the 1870 Act, in a "few instances." 2

[28]The language used was "section _____ of the Title Civil Rights". The only substantive provisions of that Title were what were to become R.S. 1977 and 1978 (formerly §16 of the 1870 Act). Title LXXIII, Chap. VII, §190 (Draft of 1872).

[29]The 1872 Draft contained a long footnote explaining that R.S. 629(16) was to have a limited scope. Respondents believe that no inferences about the scope of the other Revised Statutes can be drawn from that note.

Cong. Rec. 827-828 (1874).[30] In 1874 there were only a "few instances" of federal statutory rights that could be protected by R.S. 1979, 5508 and 5510.[31]

As noted above, Justice Powell suggested that the difference between the scope of R.S. 629(16) and the other civil rights statutes was attributable to the presence of multiple drafters. In fact, Thomas Jefferson Durant as the sole reviser had nine months to review the 1872 Draft and correct any errors. 2 Cong. Rec. 650 (1874). Although Durant's report to Congress has been lost[32] no changes were made respecting the civil rights statutes in question with the exception of the broadening of R.S. 5510 discussed above. Where the revisers and Congress intended identical meaning they used identical words. *Compare* Title XIII, Chap. III, §34(14) (Draft of 1872) and R.S. 563(14) *with* Title XIII, Chap VII, §100(13) (Draft of 1872) and R.S. 629(14).

Congress made no mistake in using the broad phrase "Constitution and laws" in R.S. 563(12), 1979, 5508 and 5510. The Supreme Judicial Court of Maine was correct when it interpreted §1983 (R.S. 1979) to mean what it says and not to be limited by the language which appears only in 28 U.S.C. §1343(3) (R.S. 629(16)).

As Justice Powell recognized, the legislative history of §1983 is a thicket. *Chapman, supra,* 441 U.S. at 623. The

[30]The source of R.S. 5510 was §2 of the 1866 Act, which in turn was also the source of R.S. 1979 (§1983). *Lynch v. Household Finance Corp.*, 405 U.S. 538, 543 n. 7 (1972).

[31]R.S. 2259 provided preemption rights for federal land. R.S. 2289 provided homestead rights for federal land. R.S. 2319 and 2320 provided for establishment of mining claims. R.S. 3194 and 3199 provide for bona fide purchaser rights following forced sales under the revenue acts. There may be some other similar statutes which respondents search of the Revised Statutes did not uncover.

[32]Introduction to Draft, (Draft of 1872).

appropriate method of resolving this case is to avoid that thicket and follow the analytical method of this Court in *Chapman:* Ignore the twists and turns of the now almost vanished trail of legislative history and read §1983 as Congress enacted it.

B. A Substantial Body of Law Supports The Application of §1983 to Statutory Claims.

1. Controlling Case Law Holds That Civil Rights Statutes Are to be Given a Broad and Literal Interpretation.

In *United States v. Price,* 383 U.S. 787, 797 (1966), this Court said of 18 U.S.C. §§241 and 242 (R.S. 5508 and 5510):

> Neither is qualified or limited. Each includes, presumably, *all* of the Constitution and laws of the United States.[33] (Emphasis in original).

The Court went on to say:

> The language of §241 is plain and unlimited. As we have discussed, its language embraces *all* of the rights and privileges secured to citizens by *all* of the Constitution and *all* of the laws of the United States. (Emphasis in original). *Id.* at 800.

The Court analyzed the broadening changes made by Congress in R.S. 5510 (18 U.S.C. §242). Section 242 is the criminal counterpart of §1983 (R.S. 1979). There is no

[33]*Accord, United States v. Classic,* 313 U.S. 299 (1941), where it was held that 18 U.S.C. §§241 and 242 applied to all possible constitutional violations, not just violations of the Fourteenth Amendment.

indication that this Court felt that the change was unwarranted, especially when viewed against the events and passions of the time. *United States v. Price* at 803.

The defendants in *Price* had conceded that §241 (R.S. 5508) applied to all laws. They were making an argument, long favored by opponents of civil rights, that §241 (R.S. 5508) did not apply to the Fourteenth Amendment. The State's argument is essentially the opposite of that made by the defendants in *Price*. They argue that §1983 (R.S. 1979) applies only to the Fourteenth Amendment and statutes identical to it. Brief of State, 13. That argument ignores the language quoted above which means that §242 (R.S. 5510) and §1983 (R.S. 1979) are to be read broadly and literally.

Additional support for respondents' argument follows from *United States v. Waddell*, 112 U.S. 76, 79 (1884). In that case an indictment under R.S. 5508 (18 U.S.C. §241) charged a conspiracy to interfere with rights secured by the Homestead Act, R.S. 2289-2291. The Court said:

> The protection of this section extends to . . . the exercise of rights dependent on the laws of the United States . . . .

See also United States v. Mosley, 238 U.S. 383, 388 (1915). As in *Waddell*, this Court and the lower federal courts have consistently treated §1983 (R.S. 1979) as protecting federal statutory rights.

2. Almost Every Case to Consider This Question Has Agreed With Respondents' Position.

To give to §1983 an interpretation other than its plain meaning and limit it to constitutional claims and statutory claims providing for equal rights would be to repudiate a large number of significant decisions by this Court. At least

since 1968 in *King v. Smith*, 392 U.S. 309 (1968),[34] this Court has held that §1983 applies to statutory claims of the same nature as the respondents' claim. In that case this Court was aware of the issues ultimately to be resolved in *Chapman*, and presumably of those raised here. After deciding that case on statutory grounds the Court went on to say:

> We intimate no views as to whether and under what circumstances suits challenging state AFDC provisions only on the ground that they are inconsistent with the federal statute may be brought *in federal courts*. (Emphasis added). *Id.* at 312 n. 3.

The meaning of that note (anticipating *Chapman*) is that since the merits had been decided on the §1983 statutory grounds, jurisdiction to bring the §1983 claim might exist only in state courts, if there were not a constitutional claim.

Following *King v. Smith*, this Court has decided numerous cases involving statutory claims raised under §1983. *Rosado v. Wyman*, 397 U.S. 397 (1970); *Dandridge v. Williams*, 397 U.S. 471 (1970); *Lewis v. Martin*, 397 U.S. 552 (1970); *California Dept' of Human Resources Development v. Java*, 402 U.S. 121 (1971); *Townsend v.*

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[34] *King v. Smith* and the subsequent cases cited *infra* usually involved constitutional claims as well as statutory ones. In *Hagans v. Lavine*, 415 U.S. 528, 543 (1974) this Court held that if the constitutional claim is substantial, the court has jurisdiction over the statutory claim and that the statutory claim should be decided first. This doctrine of pendant jurisdiction over federal statutory claims can only be utilized when there is, in fact, a federal statutory claim. It does not create those claims contrary to the inference drawn by the amici. Brief of Amici, 8 n. 9.

All of the cases cited at 27, *infra*, involved statutory claims based on the Social Security Act distinct and apart from the constitutional claims. Because the Social Security Act does not contain any express cause of action and because this Court has not held that there is an implied private cause of action, the cause of action or claim for relief could only be based on §1983.

Swank, 404 U.S. 282 (1971); *Jefferson v. Hackney*, 406 U.S. 535 (1972); *New York State Dep't of Social Services v. Dublino*, 413 U.S. 405 (1973); *Hagans v. Lavine*, 415 U.S. 528 (1974); *Edelman v. Jordan*, 415 U.S. 651 (1974); *Shea v. Vialpando*, 416 U.S. 251 (1974); *Van Lare v. Hurley*, 421 U.S. 338 (1975); *Philbrook v. Glodgett*, 421 U.S. 707 (1975); *Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471 (1977); *Quern v. Mandley*, 436 U.S. 725 (1978); *Miller v. Youakim*, 440 U.S. 125 (1979).

Two of these cases deserve more detailed consideration. In *Rosado v. Wyman*, 397 U.S. 397 (1970), this Court reached and decided a §1983 claim based on the Social Security Act when there was no constitutional question in the case. The constitutional claim had been mooted two years previously in the district court. 397 U.S. at 400.

In *Edelman v. Jordan*, 415 U.S. 651, 674-677 (1974), this Court recognized that *Rosado* stood for the proposition that respondents assert here. This Court said:

> Our Brother MARSHALL argues in dissent, and the Court of Appeals held, that although the Social Security Act itself does not create a private cause of action, the cause of action created by 42 U.S.C. §1983, [indicates] that Congress intended a cause of action for public aid recipients such as respondent. It is, of course, true that *Rosado v. Wyman* . . . held that suits in federal court under §1983 are proper to secure compliance with the provisions of the Social Security Act on the part of participating States. . . . [A] §1983 action may be instituted by public aid recipients such as respondent. . . ." (footnotes omitted)

In dissent Justice Marshall said:

> But a cause of action is clearly provided by 42 U.S.C. §1983, which in terms authorizes suits to redress deprivations of rights secured by the "laws" of the United States. *Id.* at 690.

There is equally explicit dicta in *City of Greenwood v. Peacock*, 384 U.S. 808, 829-30 (1966).

Lower courts have consistently read §1983 to mean what it says since Judge Learned Hand's decision in *Bomar v. Keyes*, 162 F.2d 136 (2d Cir. 1947). In holding §1983 applicable to statutory causes of action, the Second Circuit found "the language . . . so plain that the only question is whether this particular 'law' secured to the plaintiff a 'privilege.'" *Id.* at 139. *Accord, Louise B. v. Coluatti*, 606 F.2d 392 (3rd Cir. 1979); *Tongol v. Usery*, 601 F.2d 1091 (9th Cir. 1979); *Blue v. Craig*, 505 F.2d 830 (4th Cir. 1974); *Randall v. Goldmark*, 495 F.2d 356 (1st Cir. 1974); *Gomez v. Florida State Employment Service*, 417 F.2d 569 (5th Cir. 1969).

The House sponsor, Representative Drinan, of what was to become the Civil Rights Attorney's Fees Awards Act of 1976, 90 Stat. 2641, 42 U.S.C. §1988 (hereafter the "Fees Act")[35] cited *Blue v. Craig, supra*, with approval in explaining that §1983 protects both constitutional and statutory rights.[36] 122 Cong. Rec. 35122 (1976). His interpretation is entitled to substantial weight. *Federal Energy Administration v. Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976).

To ignore Congress' most recent statement concerning the meaning of §1983, twelve years of statutory AFDC litigation in this Court and a line of cases applying §1983 to statutory causes of action stretching back 33 years to *Bomar v. Keyes, supra*, would be a significant departure from the holding of this Court in *United States v. Price*, 383 U.S. 787,

[35]This statute is the subject of Part II of this Brief.

[36]Two Senate sponsors, Kennedy and Abourezk, also explicitly referred to this type of case, one involving a statutory claim, as one covered by the Fees Act. 122 Cong. Rec. 33314 and 33315 (1976).

797 (1966) that the use of the word "laws" in the various civil rights statutes means *all* the laws.

C. A Ruling Favorable to Respondents Will Preserve Federalism Within the Judicial System of the United States.

If this Court affirms the judgment below, it will give impetus to the salutary trend of treating state courts equally with the federal courts in the protection of important federal rights.[37] That trend has been encouraged by recent judicial writing. Address by Warren E. Burger, Proceedings of the Second National Conference on the Judiciary (March 19, 1978) *reprinted in* National Center for State Courts, *State Courts: A Blueprint for the Future* 284 (1978); H. Friendly, *Federal Jurisdiction: A General View* 90 (1973); *see also Hagans v. Lavine,* 415 U.S. 528, 559 (1974) (Rehnquist, J., dissenting).

Individuals similar to the respondents will certainly be encouraged to take cases such as this to state court if this Court affirms. Filing a similar action in federal court will require that a constitutional claim substantial enough to meet the *Hagans* test be asserted and will require the investment of considerable judicial time to evaluate the substantiality of that claim. *See, e.g., Randall v. Goldmark,* 495 F.2d 356 (1st Cir. 1974). Since there is no jurisdictional bar to asserting a statutorily based §1983 claim in state court (absent the limitations discussed below) most people will be turning to the state court for relief. A decision reversing the judgment below will leave litigants with a

[37]To the extent that the State argues that an action brought pursuant to 42 U.S.C. §1983 is not cognizable in state court, it is in error. *Martinez v. California,* U.S. , 100 S.Ct. 553, 558 n. 7 (1980).

choice between the two different court systems with no encouragement to seek relief in state court.

If this Court reverses the judgment below, in at least some states individuals such as the respondents either will be without any remedy for a state violation of their rights under the Social Security Act or will find their ability to implement those federal rights severely restricted. In some states there is a flat prohibition against judicial review of administrative hearings involving questions of entitlement to AFDC benefits.[38] In those states, individuals with valid statutory claims will go without relief.

In other states there are procedural restrictions on the type of relief available which on their face do not appear to severely restrict relief, but which respondents believe will have just that effect. For instance, in New York individuals seeking to challenge state regulations which allegedly violate their rights under the Social Security Act may not pursue their claims as class plaintiffs. *Jones v. Berman,* 37 N.Y.2d 42, 58, 371 N.Y.S.2d 422, 432 (1975). The New York Court of Appeals has reasoned that the doctrine of *stare decisis* will be sufficient to protect other persons similarly situated. Inherent in this assumption is the belief that the state agency charged with administering the AFDC program will promptly change the offending regulation following a decision favorable to one recipient of AFDC; thus there will be no need for other persons who have been or will be damaged by the offending regulation to seek judicial relief.

Turning to the State of Maine with which respondents are

[38]Alabama, Arkansas, Mississippi, North Dakota, Ohio and South Carolina appear to prohibit such review. Ala. Code §38-4-5 (1975); Ark. Stat. Ann. §83-135 (1976); Miss. Code Ann. §43-17-17 (1972); N.D. Cent. Code § §28-32-15 and 50-09-14 (1974); *Bolin v. White,* 51 Ohio App. 2d 92, 367 N.E.2d 63 (1976); and S.C. Code §43-5-150 (Supp. 1979).

most familiar, for an example, it is apparent that the type of relief that is available in New York, which is also available in Maine, is not always sufficient to protect persons other than the litigating recipient. In *Brooks v. Smith*, 356 A.2d 723 (Me. 1976), an individual plaintiff had pursued denial of Medicaid benefits by bringing a single plaintiff action. The Maine Supreme Judicial Court held that the State regulation under which the requested benefits were denied was in conflict with the Social Security Act and was invalid. Applying the rationale of the New York Courts of Appeals, one would assume that the defendant in *Brooks*, the Commissioner of Human Services, would have promptly changed the offending regulation and begun providing benefits to all persons. Such was not the case. It was well over two years later, and only after an action similar to the action presently before the court (a statutory §1983 class action seeking injunctive relief against the Commissioner) had been filed, that the Commissioner agreed to change the regulation to conform to what had been mandated by the *Brooks* decisioin. *Corliss v. Smith*, Order Approving Consent Decree, Civil Docket No. Cv 77-686 (Cumberland County Superior Court, Feb. 8, 1979).

The State argues that a ruling that §1983 means what it says will cause a flood of statutory §1983 litigation.[39] The available evidence leads to a contrary conclusion.

The *1979 Annual Report of the Director* (Administrative Office of the United States Courts) indicates that there has been no substantial increase in §1983 litigation since the decision in *Blue v. Craig*, 505 F.2d 830 (4th Cir. 1974); [40] there has been no substantial increase in §1983 litigation

[39]Brief of State 18.

[40]*1979 Annual Report of the Director, supra* at 60, Table 20.

since the passage of the Fees Act;[41] and §1983 welfare cases are less than 0.2% of the total civil caseload in the federal courts.[42]

In summation, respondents urge this Court to affirm the holding of the Maine Supreme Judicial Court that respondents stated a cause of action pursuant to §1983. The plain meaning of §1983 and a review of its history dictate the finding that it was intended by Congress to encompass deprivations under color of state law, of all federal statutory rights.

II.

THIS IS A PROPER CASE FOR AN AWARD OF ATTORNEY'S FEES.

In *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), this Court held that an award of attorney's fees to prevailing plaintiffs could not be made under the private attorney general exception to the American rule generally barring an award of fees. Because that theory had been relied on by civil rights plaintiffs to recover their attorney's fees piror to 1975, Congress followed the obvious suggestion of this Court and exercised its broad discretion in the area of attorney's fees[43] by enacting the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. §1988. It recognized the necessity of private enforcement of the civil rights acts. The statute is broad in its scope and clear

[41]*Id.*

[42]Section 1983 welfare cases total, for 1978 and 1979, respectively, 214 and 195, out of 138,770 and 154,666 total civil rulings. Annual Report, A-14, Table C 2.

[43]*Alyeska* at 262.

in its meaning. In pertinent part, it reads:

> In any action or proceeding to enforce a provision of section [1983] the court, in its discretion may allow the prevailing party... a reasonable attorney's fee as part of the costs.

The Fees Act supports respondents' contenstions, which were accepted by the Supreme Judical Court of Maine, that it allows an award of fees where the plaintiff seeks to enforce statutory rights in a §1983 proceeding and that such an award can be made by state courts. The Fees Act speaks of "any action"; it does not limit its coverage to actions in federal court. The Fees Act speak of "§1983"; it does not speak of § 1983 constitutional claims.[44]

The amici, relying on *National League of Cities v. Usery*, 426 U.S. 833 (1976), suggested that the Tenth Amendment bars an award of fees in this case. Brief of Amici, 14 n. 15. That case holds only that Congress has no power to invade the core functions of a state when acting pursuant to the Commerce Clause.[45] An award of fees is ancillary. *Hutto v. Finnery*, 437 U.S. 678, 695-697 (1978). It is not an invasion of as state's core function. The Tenth Amendment does not bar an award of fees.[46]

---

[44]The first sentence of §1988, which has been inforce since 1866, appears to refer only to actions in federal courts but has been held to control the remedies available in state court proceedings to enforce the civil right laws. *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 240 (1969). In any event the second sentence does not even appear to be so limited.

[45]Neither the Social Security Act nor the Fees Act was enacted pursuant to the Commerce Clause; thus *National League of Cities* is not applicable. *Dupler v. City of Portland*, 421 F. Supp. 1314, 1320 (D. Me. 1976).

[46]Note 15 of the Brief of Amici appears to imply that a state's immunity bars an award of fees. Sovereign immunity is not an available

(continued)

The amici have also suggested that Congress did not intend for the Fees Act to apply in state court. Brief of Amici, 14. In support of this contention they cite a line of cases from this Court saying that state courts are free to apply their own rules of procedure in actions in which the plaintiff seeks to enforce Federal rights. Those cases are not persuasive because the Fees Act deals not with procedure but with remedies. *Sullivan v. Little Hunting Parking, Inc.*, 396 U.S. 229, 240 (1969) treated §1988 as a remedial provision. The Court indicated its desire to insure that state law not be applied to defeat the underlying purpose of the federal cause of action. This Court also noted in *Alyeska* that in a diversity action the federal district court would be required to apply a state law on attorney's fees because such a state law was one dealing with substance not procedure. 421 U.S. at 259 n. 31. There is no basis for arguing that the Fees Act is procedural; it applies in state courts.

The purpose of the Fees Act is to provide for private enforcement of federal rights. S. Rep. 94-1011, 94th Cong., 2d Sess. 2; 1976 U. S. Code, Cong. & Ad. News 5908, 5909-5910. That report recognized that prevailing parties may recover attorney's fees for their statutorily based §1983 claims. *Id.* at 4.

During the debates, Representative Drinan, the House sponsor of the Fees Act[47] said:

(footnote continued from preceding page)

defense to a federal cause of action. *Ferri v. Ackerman*, U.S. , 100 S.Ct. 402, 406 (1979). The Eleventh Amendment does not bar such an award, *Hutto, supra* at 693-694, because the Fees Act was enacted pursuant to §5 of the Fourteenth Amendment as to which Congress' power is extremely broad. *Katzenbach v. Morgan*, 384 U.S. 641 (1966); *see*, L. Tribe, *American Constitutional Law*, §5-14 (1978).

[47]The remarks of the sponsor of legislation are entitled to great weight. *Federal Energy Administration v. Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976).

> The purpose of [this bill] is to authorize the award of a reasonable attorney's fee in actions brought in State or Federal courts, under certain civil rights statutes . . . .
>
> The attorney fee provision of this bill would apply to actions instituted under sections [1983] These sections generally prohibit the denial of civil and constitutional rights in a variety of areas . . . including federally assisted programs and activities.
>
> Under applicable judicial decisions, Section 1983 authorizes suits against State and local officials based upon Federal statutory as well as constitutional rights. 122 Cong. Rec. 35122 (1976).

These views, that an action to enforce statutory rights brought prusuant to §1983, when brought in state court, is a proper case for an award of fees under the Fees Act, were not challenged or questioned during the debates and give additional support to the view which respondents assert concerning the Fees Act.

In fact, in cases in federal court where a pendant state law claim is joined with a civil rights claim and the plaintiff prevails on the former, fees are awarded under the Fees Act. H.R. Rep. 94-1558, 94th Cong., 2nd Sess. 4 n. 7 (1976). *Seals v. Quarterly County Court*, 562 F.2d 390, 393-394 (6th Cir. 1977), awarded fees under the Fees Act in a case where the plaintiffs prevailed on a pendant state claim.

Congress enunciated with clarity its desire that fees be paid in all types of cases brought pursuant to §1983. The statute itself admits of no exception and should be applied according to its terms.

As the Supreme Judicial Court of Maine so aptly stated:

> The argument in favor of construing the Civil Rights Attorney's Fees Awards Act to apply to the state courts [and to statutory §1983 actions] is derived from the main purpose of the Act: namely, to encourage private

> citizens to take action, which they might not otherwise take, as 'private attorney's general' to enforce civil rights laws. That purpose ought to be carried out uniformly . . . in state courts as well as federal.
>
> . . . .
>
> The desirability of uniform remedies throughout the nation in civil rights actions and the unanimity of such authority on the point as so far exists persuade us that the Civil Rights Attorney's Fees Awards Act of 1976 should be applied [to this type of action]. (A. 63, Opinion).

This Court should adopt that reasoning.

Conclusion

For the reasons set out above, respondents request this Court to affirm the judgement of the Maine Supreme Judicial Court and remand this matter to that Court with instructions that this case be remanded to the Maine Superior Court for a a determination of respondents' attorney's fees in accord with the provisions of the Civil Rights Attorney's Fees Awards Act.

Respectfully submitted,

/s/ Robert Edmond Mittel
Robert Edmond Mittel, Esq.
Sewall & Mittel
178 Middle Street
Portland, Maine 04112

/s/Susan Calkins
Susan Calkins, Esq.
Pine Tree Legal Assistance, Inc.
146 Middle Street
Portland, Maine 04101

/s/ Hugh Calkins, Esq.
Hugh Calkins, Esq.
Calkins & Wuesthoff
97A Exchange Street
Portland, Maine 04101

/s/ Howard H. Dana, Jr.
Howard H. Dana, Jr., Esq.
Verrill & Dana
Two Canal Plaza
Portland, Maine 04112

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-838

STATE OF MAINE AND MICHAEL R. PETIT, COMMISSIONER OF THE DEPARTMENT OF HUMAN SERVICES, STATE OF MAINE,

Petitioners,

v.

JOLINE THIBOUTOT AND LIONEL THIBOUTOT, AND ON BEHALF OF OTHERS SIMILARLY SITUATED,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE STATE OF MAINE

REPLY BRIEF FOR PETITIONERS

RICHARD S. COHEN
ATTORNEY GENERAL

JAMES EASTMAN SMITH
ASSISTANT ATTORNEY GENERAL

STATE HOUSE
Augusta, Maine 04333

Counsel for Petitioners.

April 1980

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-838

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MICHAEL R. PETIT

Petitioners,

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JOLINE THIBOUTOT AND
LIONEL THIBOUTOT, *et al.*,

Respondents.

REPLY BRIEF FOR PETITIONERS

I. INTRODUCTION

This Reply Brief is in answer to Respondents' Brief dated March 28, 1980. Preliminarily, petitioners believe it is unnecessary to refute each and every assertion of respondents Thiboutot. Consequently, the following comments will be limited to those arguments and statements which petitioners have determined are particularly erroneous. Petitioners also note that much of respondents' brief appears to be predicated upon several theories pertaining to the applicability of 42 U.S.C. §1983 propounded by Justice White in *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 646-672 (1979). Petitioners, in response thereto, adopt Justice Powell's reasoning in *Chapman, id.*, at 623-646. Additionally, the language found on pages 4 and 5 of this Brief was adopted virtually verbatim from the Supreme Court Brief filed on behalf of Respondent G. Thomas Riti in *Gonzales et al. v. Young*, No. 77-5324 at 27-30.

II. RESORT TO EXTRINSIC SOURCES IS NECESSARY FOR A CORRECT INTERPRETATION OF "AND LAWS"

Respondents mistakenly argue that the meaning of the words "and laws" as contained in 42 U.S.C. §1983 is plain, thereby precluding any review of the legislative and social history surrounding the enactment thereof. (R. 8,13). However, as demonstrated by the number of court opinions dealing with the proper interpretation of the above phrase, it is clear that the import of those words is far from evident, *e.g., Chapman, supra; Lynch v. Household Finance Corp.*, 405 U.S. 538 (1971). In fact, when confronted with a problem of statutory interpretation or construction similar to the one *sub judice*, this Court has often resorted to related statutes in order to analyze appropriately the true meaning and legislative intent of statutory phrases. *Chapman, supra; Examining Board of Engineers, Architects and Surveyors v. Flores De Otero*, 426 U.S. 572 (1976); *District of Columbia v. Carter*, 409 U.S. 418 (1973).

Justice Brennan, prior to formulating the Court's response to a question concerning whether the District of Columbia constitutes a "State or Territory" within the meaning of 42 U.S.C. §1983, stated:

> Indeed, such "[w]ords generally have different shades of meaning, and are to be construed if reasonably possible to effectuate the intent of the lawmakers; and this meaning in particular instances is to be arrived at, not only by a consideration of the words themselves, but by considering, as well, the context, the purposes of the law, and the circumstances under which the words were employed." (cases cited).

Id. at 420. Similar methods of construing statutory meaning were utilized by Justice Blackmun in *Examining Board v. Flores De Otero, supra* at 580, citing *Dist. of Columbia, id.*

Although not involving the interpretation of section 1983, *Cass v. United States*, 417 U.S. 72, 77 (1974), lends support to the proposition that "[w]hen aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination'." Citing *United States v. American Trucking Assn's., Inc.*, 310 U.S. 534, 543-544 (1940); *Harrison v. Northern Trust Co.*, 317 U.S. 476, 479 (1943).

III. BASED UPON AN HISTORICAL PERSPECTIVE §1983 WAS NOT INTENDED TO REMEDY VIOLATIONS OF ALL FEDERAL STATUTES

The Court has correctly stated that "[a]ny analysis of the purposes and scope of §1983 must take cognizance of the events and passions of the time at which it was enacted." *Dist. of Columbia* at 425. However, respondents have substantially disregarded this advice which has resulted in their incomplete analysis of the phrase "and laws". Had respondents considered the sordid state of affairs that existed in the south during the reconstruction days, they would have properly concluded that §1983 was enacted to provide an avenue of redress for a violation of Fourteenth Amendment rights or equal (civil) rights under previous civil rights acts or related constitutional amendments.

Instead, respondents incorrectly argue that a comparison of similar words contained in statutes related to §1983 and enacted in 1874 leads to the contrary conclusion that the contested phrase "and laws" encompasses all federal laws. (R. 9, 10, 19). However, this argument overlooks the recognized fact that §1983 and its jurisdictional counterpart (§1343(3)) are complementary, having derived from the identical source of the Act of 1871. *Lynch v. Household Finance Corp.*, 405 U.S. at 540, 543, n. 7; *Chapman*, 441 U.S. at 616; *Examining Board v. Otero De Flores, supra* at 583. This common genesis provides for additional weight to be accorded to the premise that §1983 should be restricted to the meaning of the words found in §1343(3), or, to laws providing for equal rights as found in the Constitution and the Civil Rights Act of 1866.

In fact, the Court noted in *Lynch, supra* at 545, that the "broad concept of civil rights embodied in the 1866 Act and in the Fourteenth Amendment is unmistakably evident in the legislative history of §1 of the Civil Rights Act of 1871 . . ." Moreover, the legislative history indicates that §1 of the 1871 Act was designed precisely to enforce, in a federal civil action, the substantive rights enunciated in the 1866 Act which were subsequently included in the Fourteenth Amendment. Representative Shellabarger of Ohio, the floor manager of the bill in the House, stated that:

> The model for [§1 of the 1871 Act] will be found in the second section of the Act of April 9, 1866, known as the 'Civil Rights Act.' That *section provides a criminal proceeding in identically the same case as this one provides a civil remedy for*, except that the deprivation under color of State law must, under the Civil Rights Act, have been on account of race, color or former slavery. *This section* of the bill, on the same state of facts, not only *provides a civil remedy* for persons whose former condition may have been that of slaves, but also to all people *where, under color of State law, they* or any of them *may be deprived of rights to which they are entitled under the Constitution* by reason and virtue of their national citizenship." Cong. Globe, 42d Cong., 1st Sess., app. 68 (1871) (*emphasis added*).

It is at once clear that the "constitutional" rights, as contemplated by §1 of the 1871 Act, were the very rights which Congress took pains to specify in §1 of the 1866 Act for the purpose of affording equality to the newly emancipated blacks. To the extent, however, that the 1871 Act is limited to enforcing rights violated "under color of State law," it is narrower than §1 of the 1866 Act. But to the extent that it affords relief to all people, and not just former slaves, it is consistent with Congress' original understanding of the Thirteenth Amendment respecting equality which was subsequently made manifest in the Fourteenth Amendment. This theme was re-affirmed by Representative Arthur of Kentucky, an opponent of the 1866 and 1871 Acts, who described the reach of §1 of the 1871 Act as "cumulative, as far as it goes, with certain provisions in the [1866] civil rights bill." Cong. Globe, 42d Cong., 1st Sess., 365 (1871).

Likewise, Senator Edmunds recognized the substantive interplay between the Fourteenth Amendment and the 1966 Act:

> The first section [of the 1871 Act] is one that I believe nobody objects to, as defining the rights secured by the Constitution of the United States when they are assailed by any State law or under color of any State law, and *it is merely carrying out the principles of the civil rights bill [of 1866] which have since become a part of the Constitution.*" Cong. Globe, 42d Cong., 1st Sess., 568 (1871) (*emphasis added*).

Representative McHenry declared that §1 of the 1871 Act "is intended as an amendment to the Civil Rights Act [of 1866]" which "gives a civil remedy for the deprivation of rights, privileges and immunities secured by the Constitution. ..." Cong. Globe, 42d Cong., 1st Sess., 429 (1871).

When §1 of the 1871 Act refers to rights "secured by the Constitution," it clearly applies to the rights set forth in the 1866 Act which were subsequently constitutionalized, at least against state deprivation, in the Fourteenth Amendment, and later restated in the 1870 Act in the form of implementing legislation. The point is, then, that the 1871 Act was uniformly understood to provide a civil remedy to enforce the equal rights of national citizens as specified in the Fourteenth Amendment and its implementing legislation as contained in the 1866 and 1870 Acts.

It is, therefore, not surprising that when in 1874 all federal statutes were revised and modified, language was added to the successors of §1 of the 1871 Act to clarify this understanding. Petitioners submit that neither Congress nor the revisers of the statutes ever intended to enlarge the original reach of §1 of the 1871 Act by enacting R.S. 1979. Rep. Shellabarger specifically referred to the kinds of rights to be protected by §1 of the Act of 1871, and, petitioners urge, by R.S. 1979.

> . . . [i]t seems clear that §1 of the Act, with which we are here concerned, was designed primarily in response to the unwillingness or inability of the state governments to enforce their own laws against those violating the *civil rights* of others. (*emphasis added*). *Dist. of Columbia v. Carter*, 409 U.S. 418, 426 (1973).

Since the *Chapman* case decided that the Social Security Act is not one providing for equal or civil rights (*id.* at 621, 623), and since the rights to be secured by the Constitution "and laws" were civil rights, respondents' broadly expanded definition of "and laws" must fail.

Petitioners find it somewhat ironic that respondents insist that the words "and laws" be subject to a strict, plain meaning standard, while simultaneously asserting that the phrases "and laws", "or laws", and "any laws" be given the identical meaning (R. 10, 15). Also, as Amici States have demonstrated (*Amici 9*), an anomaly will result if respondents' quest for a broadening of the §1983 cause of action is successful, since, due to *Chapman*, federal jurisdiction will not henceforth always be available for violations of the Social Security Act.

IV. RESPONDENTS' RELIANCE ON SEVERAL DECISIONS IS MISPLACED

Respondents rely on *United States v. Price*, 383 U.S. 787 (1966), in support of their argument that the "and laws" pro-

visions of §1983 must be read broadly to cover all federal laws. *Price* involved, *inter alia*, the dismissal by a Federal District Court of a conspiracy indictment drawn under §241. The indictment concerned the brutal murders of three persons allegedly by members of the sheriff's office in concert with civilian co-conspirators. In contrast, the case at bar contains *no* allegations of deliberate wrongdoing and can easily be distinguished factually in all aspects from *Price*. Although the *Price* Court implied that §242 and §1983 are to be read broadly, the implication was made in the context of a criminal proceeding and did not address the principles enunciated by Justice Powell in *Chapman* at 641-644.

Respondents appear to be overly impressed by the number of cases which have been decided involving statutory claims raised under §1983 (R. 23, 24). However, all of these cases arose prior to *Chapman* (placing in doubt their jurisdictional basis), and all but three involved pre-42 U.S.C. §1988 (Attorneys Fees Awards Act) litigation. Concerning *Bomar v. Keyes*, 162 F.2d 136 (2d Cir. 1947) (R. 25), suffice it to say that the Second Circuit treated §1983 both as a cause of action and as a jurisdictional grant, without a reference to §1343(3) and its "equal rights" limitation. Of course, *Chapman* disposed of the concept of §1983 granting jurisdiction.

V. CLARIFICATIONS

Two additional points merit further reply. Concerning the amount of attorney's fees at issue herein, respondents' counsel has claimed the amount of $5,622.06 for his services as of October 6, 1977 (A.37-38, R.3). In connection therewith, respondents assert that the State of Maine has never contested the reasonableness of that amount (R.3), but neglect to mention that that very issue was remanded to the Superior Court by the Supreme Judicial Court for future determination (A.64-65). If respondents prevail in this matter, and allegations of violations of all federal statutory provisions are found to be within the meaning of §1983 and therefore §1988, the concept of *pro bono* legal work will be moribund, not to mention the increased amount of litigation likely to ensue for the purpose of deciding whether or not any federal statute will be exempted from the potential largesse of this case.

In their main Brief, petitioners inadvertently neglected to include the case of *Bond v. Stanton*, 528 F.2d 688 (7th Cir.),

vacated and remanded, 429 U.S. 973 (1976), *opinion on remand*, 555 F.2d 172 (1978), among the kind of cases cited by Senator Kennedy to which the Fees Act was intended to apply. (Pet. Brief 21-22). It is petitioners' contention that the Senator cited this case as authority for granting fees against those state officials who operate in bad faith and whose wrongdoing was apparent.

In conclusion, petitioners cannot agree with respondents' suggestion for resolving this matter. Respondents would have this Court avoid the thicket apparent in the legislative history of §1983 and "[i]gnore the twists and turns of the now almost vanished trail of legislative history and read §1983 as Congress enacted it." (R.21). Petitioners suggest instead that the Court resolve the matter before it by viewing the interpretation of "and laws" in light of the social and political turmoil that existed at the time of the enactment of §1983 and its predecessors. Certainly, it would be incredible to conclude that a good faith error in the interpretation of complex federal Social Security regulations could lead to a violation of respondents' rights as contemplated by the drafters, legislators, and revisers of the Civil Rights Act of 1871 and R.S. 1979.

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ON WRIT OF CERTIORARI TO THE
SUPREME JUDICIAL COURT OF THE
STATE OF MAINE

BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF MAINE, *AMICI CURIAE*

CHARLES S. SIMS
BRUCE J. ENNIS
c/o American Civil Liberties
Union Foundation
132 West 43rd Street
New York, N.Y. 10036

Attorneys for *Amici*
Curiae

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-838

STATE OF MAINE, et. al.,

Petitioners,

v.

JOLINE AND LIONEL THIBOUTOT, et. al.,

Respondents.

ON WRIT OF CERTIORARI TO THE
SUPREME JUDICIAL COURT OF THE
STATE OF MAINE

BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF MAINE, AMICI CURIAE

INTEREST OF AMICI CURIAE

The American Civil Liberties Union is a nationwide, non-partisan organization of over 200,000 members, dedicated to defending the rights secured by the Constitution and laws

of the United States. Together with its state affiliates, the ACLU has been particularly interested in creating effective remedies for rights abridged when state officials violate federal law. The ACLU's effort to preserve and protect 42 U.S.C. §1983 as a cornerstone of this effort has led to its participation, directly or as amicus curiae, in numerous §1983 cases in the Court over the past decades. It has also led the ACLU to work in Congress for passage of the Civil Rights Attorneys' Fees Awards Act of 1976, 42 U.S.C. §1988, to enable citizens to afford the legal actions §1983 authorizes.

This case raises the question whether the effectiveness of §1983 and §1988 in securing adherence by state officials to Federal law will be maintained, or drastically weakened by a grudging, narrow reading contrary to the plain words of those statutes. We submit this brief amici curiae to urge the Court to protect individual rights by construing §1983 and §1988 in accordance with their plain, unambiguous, expansive language, and in light of the broad, remedial purposes for which they were enacted.*

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* Letters from all parties consenting to the filing of this brief have been lodged with the Clerk of the Court.

SUMMARY OF ARGUMENT

Since 28 U.S.C. §§1343 (3) and 1331 grant original but not exclusive federal jurisdiction over actions arising under 42 U.S.C. §1983, the court below properly exercised concurrent jurisdiction. Martinez v. California, 48 U.S.L.W. 4076 (Jan. 15, 1980); Grubb v. Public Utilities Commission of Ohio, 281 U.S. 470 (1930).

On its face, §1983 provides a cause of action for the deprivation, under color of law, of "rights, privileges, and immunities secured by the Constitution and laws." Since the Social Security Act is a law which provides rights to welfare recipients, the Thiboutots properly brought this §1983 action seeking to secure compliance with the provisions of the Social Security Act by Maine, a participating state. Rosado v. Wyman, 397 U.S. 397 (1970). Petitioners contend, however, that since the phrase "and laws" was added to §1983 at some point during the 1874 statutory revision process, §1983 should be read narrowly to refer only to laws which provide for equal rights.

That contention has been foreclosed for at least two reasons. First, Congress intended the 1874 Revision to act as a complete

repeal of prior statutes. The effect of such a complete repeal, as Congress well knew, was to preclude judicial examination of prior statutes in cases of conflict between original statutes and revised statutes. Second, the Supreme Court adopted rules of construction consistent with Congress' intent to effectuate an absolute repeal. The revised statute must therefore be given full effect, notwithstanding a discrepancy between it and the prior statute. Continental Casualty Co. v. United States, 314 U.S. 527, 530 (1942); Hamilton v. Rathbone, 175 U.S. 414 (1899); United States v. Bowen, 100 U.S. 508 (1880).

Even if this Court's long-standing rules of statutory construction did not prevent Maine from invoking a long-repealed act in order to throw doubt on §1983's proper interpretation, the consistent application by courts and Congress of the plain language of §1983 should lead this Court to give full effect to that language.

This Court has already decided that for a specific statute to serve as a basis for recovery under §1983, two conditions must be satisfied: (1) the law must secure some right, privilege, or immunity to the plaintiff; and

(2) Congress must not have provided an exclusive means of statutory enforcement. Adickes v. Kress, 398 U.S. 144 (1970); Rosado v. Wyman, supra.

Lower Federal Courts have applied this two-part test in numerous cases brought to protect federal statutory rights. Congress has implicitly approved the full scope of 42 U.S.C. §1983 by legislating on the basis of those cases. For example, in enacting the Civil Rights Attorney's Fees Awards Act of 1976, Congress made clear its awareness that §1983 protected the entire range of federal statutory rights as well as its intention that attorneys' fees should be awarded to those suing under §1983 to protect those statutory rights. Therefore, the findings of the Court below that this action was properly brought under §1983 and that this was a proper case for an award of attorneys' fees should be affirmed.

ARGUMENT

I. THE COURT BELOW PROPERLY EXERCISED CONCURRENT JURISDICTION OVER THIS §1983 CAUSE OF ACTION.

This Court has held that "state courts of general jurisdiction have the power to decide cases involving federal constitutional rights where...neither the Constitution nor statute withdraws such jurisdiction." Boston Stock Exchange v. State Tax Commission, 429 U.S. 318, 320 n.3 (1977). If a Congressional statute contains no express provision to the contrary, a grant of concurrent jurisdiction over the enforcement of federal statutes will be presumed. Grubb v. Public Utilities Commission of Ohio, 281 U.S. 470 (1930); Claffin v. Houseman, 93 U.S. 130, 136 (1876); Houston v. Moore, 18 U.S. 1, 25-26 (1820); Hart and Wechsler, Federal Courts and the Federal System, 418 (2d Ed. 1973). Since 28 U.S.C. §§1343 (3) and 1331 grant original but not exclusive jurisdiction to federal courts to hear actions arising under 42 U.S.C. §1983, state courts may properly exercise concurrent jurisdiction.[1/]

[1/] Section 1331 provides in pertinent part:

(footnote continued on next page)

This Court has already indicated that concurrent federal and state court jurisdiction to hear §1983 claims exists. Martinez v. California, 48 U.S.L.W. 4076, 4077 n.7, (Jan. 15, 1980); Aldinger v. Howard, 427 U.S. 1, 15, 18 (1976); Id. at 36 n.17 (Brennan, J., dissenting); Jones v. Hildebrant, 432 U.S. 183 (1977) (per curiam). Concurrent state court jurisdiction over §1983 claims is consistent with the philosophy of federalism embodied in the Constitution and expounded in Stefanelli v. Minard, 342 U.S. 117 (1951), and Younger v. Harris, 401 U.S. 37 (1971). A

(footnote continued from preceding page)

> The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States....

Section 1343 (3) confers jurisdiction on federal courts:

> To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States....

contrary result is not required by any concern over the unwillingness on the part of state courts to protect constitutional and statutory rights, because the Supremacy Clause requires state court judges to enforce federal law when applicable, Testa v. Katt, 330 U.S. 386, 391 (1947), and because federal forums will in any event remain available at the option of the plaintiff, as specifically contemplated by the 42nd Congress.

Every federal court that has been faced with the question of state court §1983 jurisdiction has assumed it exists. See, e.g., Spence v. Latting, 512 F.2d 93 (10th Cir. 1975), cert. denied, 423 U.S. 896 (1975); Long v. District of Columbia, 152 U.S. App. D.C. 187, 469 F.2d 927 (1972); Advertiser Company v. Wallace, 446 F.Supp. 677 (M.D. Ala. 1978) (Johnson, C.J.). State courts in at least 22 states have exercised jurisdiction over §1983 causes of action.[2/] The

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2/ Fairbanks Correctional Center v. Williamson, 600 P.2d 743 (Alaska 1979); New Times, Inc. v. Ariz. Board of Regents, 20 Ariz. App. 422, 513 P.2d 960 (1973); Brown v. Pitchess, 13 Cal. 3d 518, 531 P.2d 772, 119 Cal. Rptr. 204 (1975); Silverman v. Univ. of Colorado, 36 Col. App. 269, 541 P.2d 93 (1975);

(footnote continued on next page)

court below properly exercised concurrent jurisdiction over respondent's §1983 claim.

(footnote continued from preceding page)

Vason v. Carrano, 31 Conn. Sup. 338, 330 A.2d 99 (1974); Continental Casualty Company v. DuPont School District, 317 A.2d 101 (Del. 1974); Backus v. Chilivis, 236 Ga. 500, 224 S.E.2d 370 (1976); Alberty v. Daniel, 25 Ill. App. 3d 291, 323 N.E. 2d 110 (1974); Thompson v. Medical Licensing Board of Indiana, 398 N.E. 2d 679 (Ind. App. 1979); Rzeznik v. Chief of Police of Southhampton, 373 N.E. 2d 1128 (Mass. 1978); Armstrong v. Ross Twp., 82 Mich. App. 77, 266 N.W. 2d 674 (1978); Shapiro v. Columbia Un. Nat. Bk. and Tr. Co., 576 S.W. 2d 310 (Mo. 1978) (en banc) (per curiam); NBC, Inc. v. Engel, 397 A.2d 636 (N.H. 1979); T & M Homes, Inc. v. Township of Mansfield, 162 N.J. Super. 497, 393 A.2d 613 (1978); Gomez v. Board of Education of Duke Ind. School District No. 21, 85 N.Mex. 708, 516 P.2d 679 (1973); Clark v. Bond Stores, Inc., 41 A.D.2d 620, 340 N.Y.S. 2d 847 (1973); Williams v. Greene, 36 N.C. App. 80, 243 S.E. 2d 156 (1978); Rosacker v. Multnomah County, 603 P.2d 1216 (Or. App. 1979); Commonwealth ex. rel. Saunders v. Creamer, 464 Pa. 2, 345 A.2d 702 (1975); Kish v. Wright, 562 P.2d 625 (Utah 1978); Terry v. Kolski, 78 Wisc. 2d 475, 254 N.W. 2d 704 (1977); Board of Trustees v. Holso, 584 P.2d 1009 (Wyo. 1978).

II. 42 U.S.C. §1983 PROVIDES A REMEDY FOR THE DEPRIVATION OF STATUTORY AS WELL AS CONSTITUTIONAL RIGHTS.

42 U.S.C. §1983 provides a private cause of action for the deprivation, under color of state law, of "rights, privileges, and immunities secured by the Constitution and laws."[3/] The language could not be more plain. Yet petitioners, following three members of this Court concurring in Chapman v. Houston Welfare Rights Organization,

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3/ Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding or redress.

Plaintiffs invoke §1983 in order to secure state compliance with the Social Security Act, 42 U.S.C. §601, et. seq. This Court has held that the Social Security Act is a law which secures certain rights to welfare recipients. Rosado v. Wyman, 397 U.S. 397 (1970).

U.S. , , 60 L.Ed. 2d 508, 526 (1979) (Powell, J., concurring), contend that since the phrase "and laws" was added at some point during the 1874 statutory revision process, §1983 should be read narrowly to encompass only constitutional rights and rights secured by laws providing for equal rights. That contention should be rejected, however, for two reasons. First, Congress unequivocally intended in 1874 to repeal completely all prior statutes, including the predecessor of §1983. The effect of such a complete repeal, as Congress well knew, was to preclude judicial examination of prior statutes in cases of conflict between original statutes and revised statutes. Second, the federal courts honored Congress' intention by adopting the following rule of construction:

> Revised Statutes must be treated as the legislative declaration of the statute law on the subjects which they embrace, on the first day of December, 1873. When the meaning is plain, the courts cannot look to the statutes which have been revised to see if Congress erred in that revision, but may do so when necessary to construe doubtful language....

United States v. Bowen, 100 U.S. 508, 513 (1880). This Court must respect Congress' intentions and its own firm precedents, and

accord the phrase "and laws" in §1983 the all-inclusive meaning it plainly conveys.

A. Congress Intended to Repeal All Prior Acts When It Enacted the 1874 Revision.

Pursuant to the Act of June 27, 1866, 14 Stat. 74, President Andrew Johnson appointed a commission to revise, simplify, consolidate, and arrange all existing Federal statutes, which then comprised some 17 hefty volumes. In order to condense those 17 volumes into one, the revisers were "authorized to make changes to some extent, of which liberty they availed themselves." 2 Cong.Rec. 646 (1874) (remarks of Rep. Poland). In executing their work, the revisers "very often translated into their own language the ideas and objects of statutes, so that the new form adopted might be said to be inspired by Congress in ideas, but not in words." 2 Cong. Rec. 825 (1874) (remarks of Rep. Lawrence) (emphasis in original). Upon receipt of the finished product, however, the House Committee on Revision of the Laws determined that the statutory changes made by the revisers were so extensive that it would be impossible to secure Congressional passage of the

revision in any reasonable period of time. 2 Cong.Rec. 646 (1874) (remarks of Rep. Poland). The Committee therefore appointed Thomas Jefferson Durant, an attorney, to examine the revision and "strike out such modifications of the existing law." Id. The revision was thereafter examined by the Committee on Revision of the Laws and by the House in a series of sparsely attended evening sessions.

It quickly became clear during the evening sessions that the Committee and Mr. Durant had not "succeeded in eliminating every change which was made...." 2 Cong.Rec. 820 (1874) (remarks of Rep. Poland). See also remarks of Rep. Eldredge, 2 Cong.Rec. 1209-1210 (1874) ("...there have been radical changes in the law."). The very real possibility that such changes would elude the corrective pens of Congress led one Congressman to propose that the Committee on Revision of the Laws...

> ultimately report to the House that in the re-enactment of the statutes by this bill there should be a provision to the effect that nothing contained in this re-enactment shall be construed or held in any way to change the law in existence at the commencement of this session... It seems to me that such a provision as that would be better than anything else to preserve the law as it now exists.

2 Cong. Rec. 648 (1874) (remarks of Rep. Willard).

That proposal was rejected, however, in favor of a complete repeal provision, §5596. 2 Cong. Rec. 2713 (1874).[4/]

Despite Congress' attempts to correct the revisers' modifications, at least 253 substantive errors were discovered in the years immediately following enactment of the revision. Dwan and Feidler, The Federal Statutes--Their History and Use, 22 Minn. L. Rev. 1008, 1014 (1938). As Dwan and Feidler note, "[t]hat experience with errors made Congress reluctant to enact revisions of statutes as law." Id. Indeed, when it authorized a new edition of the Revised Statutes in 1878 (which would revise only those laws enacted since

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4/ R. S. §5596 provides in part:

> All acts of Congress passed prior to said first day of December, 1873, any portion of which is embraced in any section of said revision, are hereby repealed, and the section applicable thereto shall be in force in lieu thereof.

See also remarks of Rep. Lawrence, 2 Cong. Rec. 1029 (1874) ("Where a statute is evidently designed as a revision of the whole subject, it repeals by implication all other statutes upon the same subject. That is a rule of law....").

1873), Congress was quite careful not to repeat its mistakes of four years earlier. In introducing a bill,[5/] later passed, to amend the Act already passed authorizing the 1878 edition of the Revised Statutes, Sen. Christiancy explained:

> The Revised Statutes, the present edition, on their adoption repealed all the laws which were re-enacted in them, and it was found that there were a great many errors in the revision adopted, which altered the law contrary to the intention of Congress in the passage of them. We have been constantly correcting those errors, but the courts cannot look back to the original and be governed by that, because the original act has been repealed and the revision has been made itself conclusive evidence. Now, to avoid any such result as that it has been thought best by the committees of both Houses that the [1878] revision should only be made evidence, but should not preclude the Court from looking back at the original act as passed; that is, in regard to acts which have been embodied in the edition since the other revision took effect, since December 1, 1873.

5/ The bill added the phrase "but shall not preclude reference to, nor control, in case of any discrepancy, the effect of any original act as passed by Congress since the first day of December, 1873." 7 Cong. Rec. 1137 (1878).

7 Cong. Rec. 1137 (1878) (emphasis supplied).6/

6/ When next Congress sought to revise the Federal statutes, in 1926, the House of Representatives proposed that the revision act as a complete repeal of previous statutes. The Senate, however, remembering the 1874 experience, insisted that the 1926 revision be considered only prima facie evidence of the existing statutory law. As Rep. Roy Fitzgerald, Chairman of the House Committee on Revision of the Laws, explained:

> Without this qualification or amendment it would have been impossible, apparently, for this bill to pass the Senate because the scope of this work is so large and the chance for error is so great that with all the safeguarding provisions... there was still felt apprehension of danger from error, even with the provision for postponement of its taking effect to July 1, 1927, which would permit a session of Congress for the correction of errors to intervene. The Senate felt that still the danger was too great to assume the responsibility of passing a bill of this magnitude and having it absolutely replace all the laws of the United States as was done by the Revised Statutes in 1874.

67 Cong. Rec. 12074 (1926) (emphasis supplied).

Fitzgerald further noted that "there is a clear distinction between the Revised Statutes in the seventies, and the bill as it passed the House, and this bill as it comes from the Senate. In the seventies they absolutely burned all bridges behind them..."

67 Cong. Rec. 12075 (1926).

Thus, the law applied by the Maine Supreme Court, and which this Court must apply, is not the Civil Rights Act of 1871, 17 Stat. 13, which has been repealed, but R.S. §1979, which plainly provides a remedy for the deprivation of federal statutory rights. The addition of the words "and laws" by Congress in 1874, on its face, represents an unambiguous decision to effectuate enforcement of all federal statutory rights in the face of state and local opposition to such enforcement. The unqualified words "and laws" must be afforded their plain, all-inclusive meaning.

B. This Court Has Adopted Rules of Statutory Construction Consistent With Congress' Intent to Repeal All Prior Acts in Enacting the 1874 Revision.

While Congress struggled to find and correct the reviser's modifications, the federal courts were flooded with challenges to the application of the revised statutes. In order to stem this tide, and in recognition of Congress' intent that the 1874 Revision act as a complete repeal, the courts quickly adopted a "plain-meaning" rule that severely

limited the use of prior acts in construing the revised provisions. In United States v. Bowen, this Court held that the

> Revised Statutes must be treated as the legislative declaration of the statute law on the subjects which they embrace, on the first day of December, 1873. When the meaning is plain, the courts cannot look to the statutes which have been revised to see if Congress erred in that revision, but may do so when necessary to construe doubtful language....

100 U.S. 508, 513 (1880).

The Court reaffirmed Bowen the following year in Vietor v. Arthur, even though in that case "if there had been no revision, and we had been required to construe the statutes as they stood before Dec. 1, 1873, a different conclusion might have been reached." 104 U.S. 498, 500 (1881). In 1884 the Court once again had occasion to deal with changes wrought by the 1874 revision, and the Court held once again that "[o]f course, a change of phraseology which necessitates a change of construction will be deemed as intended to make a change in the law." McDonald v. Hovey, 110 U.S. 619, 629 (1884). The following year the Court used even stronger language:

> No reference, therefore, can be had to the original statutes to control the construction of any section of the Revised

> Statutes, when its meaning is plain, although in the original statutes it may have had a larger or more limited application than that given to it in the revision. United States v. Bowen, 100 U.S. 508, 513.

Deffeback v. Hawke, 115 U.S. 392, 402 (1885). See also Arthur v. Dodge, 101 U.S. 34 (1880); Cambria Iron Co. v. Ashburn, 118 U.S. 54, 57 (1886); Dwight v. Merritt, 140 U.S. 213, 217 (1891); Bate Refrigerating Co. v. Sulzberger, 157 U.S. 1, 33-34 (1895); Endlich, A Commentary on the Interpretation of Statutes, 65 (1888).

Perhaps the strongest statement of the "plain meaning" rule as applied to the 1874 Revision came in Hamilton v. Rathbone, 175 U.S. 414 (1899), where the Court dealt with an obvious conflict between the Act of April 10, 1869 and its revised counterpart, R.S. §728. Under the prior act, the power of a married woman residing in the District of Columbia to convey or bequeath her property did not extend to any property she had acquired from her husband. Under R.S. §728, however, a married woman could convey or bequeath all her property, however derived. This Court's holding in Rathbone, giving full effect to the Revised version, squarely controls the decision here:

> [W]here the act is clear upon its face, and when standing alone it is fairly susceptible of but one construction, that construction must be given to it. [citations omitted.] This rule has been repeatedly applied in the construction of the Revised Statutes...Indeed, the cases are so numerous in this Court to the effect that the province of construction lies wholly within the domain of ambiguity, that an extended review of them is quite unnecessary. The whole doctrine applicable to the subject may be summed up in the single observation that prior acts may be resorted to, to solve, but not to create an ambiguity. If Section 728 were an original act, there would be no room for construction. It is only by calling in the aid of a prior act that it becomes possible to throw a doubt upon its proper interpretation.

Id. at 419-421 (emphasis in original).

The same rules of construction have been applied more recently. In Continental Casualty Co. v. United States, 314 U.S. 527, 530 (1942), this Court, although faced with a "change...in the Revised Statutes...made without any explanation of its purpose and indeed without the brackets or italics used to indicate a repeal or amendment...," held that "[t]he revised form, however, is to be accepted as correct, notwithstanding a possible discrepancy," citing Bowen. See also Ex Parte Collett, 337 U.S. 55, 61 n.12 (1949).

Only recently, in Examining Board of Engineers v. Flores de Otero, 426 U.S. 572 (1976), this Court implicitly reaffirmed the "plain-meaning" rule as applied to the 1874 Revision.[7/] The Court concluded that the unexplained addition by the revisers of the words "or Territory" to R.S. §1979 (the predecessor statute to §1983) would be given full effect as an expression of Congressional intent to enlarge the scope of the statute. The Court in Flores de Otero decided, in short, that a change of phraseology in the 1874 revision which necessitated a change of construction would be deemed as an intentional change of the law. Id. at 582. Accord, McDonald v. Hovey, 110 U.S. at 629.

United States v. Sischo, 262 U.S. 165 (1923), relied upon by Justice Powell in his Chapman concurrence, does not require a

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7/ Whatever the continuing validity of a "plain-meaning" rule in the ordinary course of statutory construction, see Train v. Colorado Pub. Int. Research Group, 426 U.S. 1, 11 (1976), the special rules of construction applicable to the 1874 Statutory Revision--rules mandated by Congress rather than invented by Courts--have never been questioned.

different result. Justice Holmes, writing for the Court in Sischo, held that "an insertion [of language] in the Revised Statutes... is not lightly to be read as making a change, although, of course, it may do so." Id. at 168-169. Sischo, however, involved the Act of June 22, 1874, which was slightly altered in the second edition of the Revised Statutes published in 1878. As we have shown above, Congress deliberately provided that different rules of statutory construction would apply to the 1878 revision than to the 1874 revision. The 1878 revision did not repeal all of the statutes then in force, as had the 1874 revision. Sischo, therefore, is simply inapposite. See also Warner v. Coltra, 293 U.S. 155, 161 n.4 (1934) (1926 revision).

If 42 U.S.C. §1983 were an original act, there would be no room for construction. The meaning of "and laws" is plain and unambiguous on its face; it provides a remedy for the deprivation, under color of state law, of federal statutory rights.[8/] It is only

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8/ That result would not, as petitioners claim, create an anomaly in that some §1983 claims could be brought in federal courts only under §1331, and not §1343 (3). It is

(footnote continued on next page)

by calling up the ghost of a long-repealed act that any doubt can be thrown on the proper interpretation of §1983. Petitioner's attempt to invoke that ghost, and thereby create an ambiguity that is not apparent on the face of §1983, must be therefore ignored. Hamilton v. Rathbone, supra.

(footnote continued from preceding page)

entirely logical to assume that Congress chose to limit the availability of §1343 to actions seeking to enforce equal rights laws while providing jurisdiction over other statutory §1983 actions only where the requisite amount in controversy under §1331 was involved. Such a choice presumably would have been based either on the theory that suits claiming infringements of equal rights guarantees are less amenable to pecuniary valuation than are other actions, see Hague v. CIO, 307 U.S. 496, 529 (1939) (opinion of Stone, J.), or on the theory that suits claiming such violations should be heard regardless of the amount in controversy.

C. Courts and Congress Have Repeatedly Agreed That the Phrase "and laws" in §1983 Means Precisely What It Says.

The Supreme Court has held that the main object of the 1874 revision

> was to incorporate all the existing statutes in a single volume, that a person desiring to know the written law upon any subject might learn it by an examination of that volume, without the necessity of referring to prior statutes upon the subject. If the language of the revision be plain upon its face, the person examining it ought to be able to rely upon it.

Hamilton v. Rathbone, 175 U.S. at 421.

This Court has frequently relied on the plain language of §1983 and its predecessor, R.S. §1979, by indicating that §1983 would provide a remedy for violation of a broad variety of federal "laws." In Greenwood v. Peacock, 384 U.S. 808, 829-830 (1966), the Court noted that:

> [O]ther sanctions, civil and criminal, are available in the federal courts against officers of a state who violate the petitioner's federal constitutional and statutory rights. Under 42 U.S.C. §1983 (1964 ed.) the officers may be made to respond in damages not only for violations of rights conferred by federal equal civil rights laws, but for violations of other federal constitutional and statutory rights as well.

Other cases indicating that §1983 protects federal statutory rights are Monell v. New York City Dept. of Social Services, 436 U.S. 658, 700-701 (1978);[9] Mitchum v. Foster, 407 U.S. 225, 239-240 n.30 (1972);[10] Lynch v. Household Finance Corp., 405 U.S. 538, 543 n.7 (1972);[11] and Hague v. CIO, 307 U.S. 496, 526-527 (1939) (opinion of Stone, J.).[12]

9/ "[T]here can be no doubt that §1 of the Civil Rights Act [of 1871] was intended to provide a remedy to be broadly construed against all forms of official violation of federally protected rights."

10/ "Although, as originally drafted in 1871, §1983's predecessor protected rights, privileges, or immunities secured by the Constitution, the provision included by Congress in the Revised Statutes of 1874 was enlarged to provide protection for rights, privileges, or immunities secured by federal law as well."

11/ "[T]he provision in the Revised Statutes was enlarged to provide protection for rights, privileges, or immunities secured by federal law as well [as those secured by the Constitution]."

12/ "The right of action given by [§1 of the Civil Rights Act of 1871] was later... extended to include rights, privileges and immunities secured by the laws of the United States as well as by the Constitution."

This Court also expressly relied on the plain meaning of the unambiguous phrase "and laws" in Rosado v. Wyman, 397 U.S. 397 (1970), which "held that suits in federal court under §1983 are proper to secure compliance with the provisions of the Social Security Act on the part of participating states." Edelman v. Jordan, 415 U.S. 651, 675 (1974). See also King v. Smith, 392 U.S. 309 (1968).

The contention that Rosado is not controlling here because the Court there merely made an "uncritical assumption" that §1983 protects statutory rights is without merit. A close examination of the Rosado litigation reveals that the Court was there faced with the precise questions presented here: (1) does §1983 provide a cause of action for the deprivation of statutory rights; (2) if so, does the Social Security Act "secure" any rights to plaintiffs within the meaning of §1983; and (3) if so, has Congress provided exclusive enforcement provisions within the Social Security Act which would bar §1983 jurisdiction? Judge Hays, author of the Second Circuit's opinion in Rosado, did not question the availability of §1983 to protect statutory rights but held that "the

complaint, properly read, does not allege the 'deprivation of any rights, privileges, or immunities secured by the Constitution and laws' of the United States...Plaintiffs have no rights under federal law to any particular level of AFDC payments or, indeed, to any payments at all." 414 F.2d 170, 177 (2d Cir. 1969). Judge Feinberg explicitly agreed with Judge Hays' implicit ruling that §1983 provided a remedy for violation of federal statutory rights, although he dissented from the holding that no statutory right had been violated. Id. at 183-185 (Feinberg, J., dissenting). Only Judge Lumbard, concurring, denied the availability of §1983 to redress infringements of statutory rights. Id. at 181 (Lumbard, J., concurring). After full briefing and argument (see Brief for Respondents in Rosado at 3, 21, 26, 31-32), this Court reversed on the grounds "stated in the opinion of the District Court and Circuit Judge Feinberg's dissent...." 397 U.S. at 401. Justice Black's dissent, joined by the Chief Justice, did not dispute that §1983 encompasses statutory rights generally, but instead argued that Congress had entrusted

exclusive enforcement of the Social Security Act to the Department of Health, Education and Welfare. 397 U.S. at 433 (Black, J., dissenting). The majority opinion explicitly stated that "[w]e have considered and rejected the argument that a federal court is without power to review state welfare provisions or prohibit the use of federal funds by the state in view of the fact that Congress has lodged in the Department of Health, Education and Welfare the power to cut off federal funds for noncompliance with statutory requirements. We are most reluctant to assume Congress has closed the avenue of effective judicial review to those individuals most directly affected by the administration of its program." Id. at 420 (citations omitted). The sole "avenue of effective judicial review" relied upon or available in Rosado, as in King v. Smith, was §1983.

Two months after its Rosado decision this Court again reached the questions posed here. In Adickes v. Kress, 398 U.S. 144 (1970), the Court held that a violation of the Public Accommodations provisions of the 1964 Civil Rights Act would not "properly serve as a basis for recovery [of damages] under §1983."

Id. at 150 n.5. That holding was not based on any notion that §1983 did not cover statutory infringements; the "plain" terms of §1983 precluded such an argument. Id. at 150-51. Instead, the Court noted that Congress had intended the injunctive remedy of §206 of the Public Accommodations Title to be the "exclusive means of enforcing the rights based on this title." Id. The Adickes Court quoted Sen. Humphrey, floor manager of the Civil Rights Act, to the effect that the exclusive language of §206 "is necessary because otherwise it...would result...in civil liability for damages under 42 U.S.C. §1983." Ibid. quoting 110 Cong. Rec. 9676 (1964).

As the Adickes Court pointed out, Congress clearly recognized the availability of §1983 to redress statutory deprivations. In Senate hearings on the Public Accommodations provisons of the 1964 Civil Rights Act, Attorney General Robert Kennedy was asked about the existence of a §1983 cause of action in the case of an individual refused service in a restaurant because of his race. Hearings on Civil Rights and Public Accommodations Before the Senate Commerce Committee,

88th Cong., 1st Sess. 145 (1963). Kennedy, citing the Civil Rights Cases, 109 U.S. 3 (1883), responded that a court might hold that the individual had not been deprived of a constitutional right. Senator Hugh Scott, co-sponsor of the Civil Rights Act, then asked:

> "Mr. Attorney General, this, as I understand it, creates within the meaning of Section 1983 a statutory right, and it creates that statutory right absent a finding by the courts that these are constitutional rights."

Mr. Kennedy: "That is correct." Id. at 148-149 (emphasis added). See also Hearings on Civil Rights Before Subcommittee No. 5 of the Committee on the Judiciary, House of Representatives, 88th Cong., 1st Sess. 1410-1413 (1963) (remarks of Rep. Cramer, Committee Counsel Foley, and Attorney General Kennedy).

Congress, aware that §1983 would provide an alternative means to enforce the Public Accommodations Title, and apparently unwilling to allow such private actions, provided for exclusive jurisdiction. Adickes v. Kress. But there was no move to restrict §1983 to constitutional cases, much less any indication that §1983 reached only a limited

category of statutory rights. Had Congress intended to restrict §1983 generally to the protection of certain rights, rather than simply to remove the Title II right from the reach of §1983, it surely knew how to do so.

Congress was once again reminded of the sweep of §1983 during its debate over the Civil Rights Attorneys' Fees Awards Act of 1976. See infra Point III. Rep. Drinan, author of the House legislation on the subject, stated just prior to passage of the Act that "[u]nder applicable judicial decisions, Section 1983 authorizes suits against state and local officials based upon Federal statutory as well as constitutional rights. For example, Blue against Craig, 505 F.2d 830 (4th Cir. 1974)."[13] 122 Cong. Rec.

13/ Blue v. Craig was a challenge to North Carolina's policy of refusing to provide Medicaid recipients with reimbursement for transportation to and from Medicaid providers. The District Court dismissed the complaint on the ground that §1983 encompassed only constitutional claims. The Court of Appeals, after a lengthy discussion of prior case law and the 1874 Revision process, reversed: "We accordingly have no difficulty in resolving that this action, which seeks to invalidate a state-wide regulation alleged to deprive the plaintiffs of civil rights given them by the Social Security Act, even if regarded as being wholly statutorily-based, qualifies under §1983." 505 F.2d at 836.

35122 (1976). Similarly, in discussing the inconsistency of existing attorneys' fees statutes, the Senate report accompanying the Act stated that fees are allowed in a suit under Title II of the 1964 Civil Rights Act challenging discrimination in a private restaurant, but not in suits under 42 U.S.C. §1983 redressing violations of the Federal Constitution or laws by officials sworn to uphold the laws." S.Rep. No. 94-1011, 94th Cong., 2d Sess., reprinted in 5 U.S. Code Cong. & Administrative News 5908, 5911 (1976) (emphasis added). This passage was read to the House by Rep. Seiberling, a co-sponsor of the House legislation, just prior to adoption of the Senate bill by the House. 122 Cong. Rec. 35128 (1976). And just seconds before the bill passed in the Senate, Sen. Abourezk, floor manager of the bill, stated that "[t]his legislation is intended to cover cases based on both constitutional and statutory rights, including Supremacy Clause cases. 122 Cong. Rec. 33315 (1976).

Surely, if the interpretation of §1983 as encompassing all federal statutory rights represented "a dramatic expansion of federal

court jurisdiction," as the Chapman concurrence contended, then Congress, if it opposed such an "expansion," would have expressed that opposition in some fashion in 1964 and again in 1976 when the scope of §1983 was explicitly put before it.

Lower federal courts have also relied extensively on the unambiguous language of 42 U.S.C. §1983 and its predecessor, §1979. As early as 1945 the Third Circuit Court of Appeals refused to dismiss a R.S. §1979 complaint seeking damages for false arrest and detention in violation of the Uniform Extradition Act, Picking v. Pa. R. Co., 151 F.2d 240 (3d Cir. 1945), cert. denied, 332 U.S. 776 (1947). Since Picking, every Court of Appeals which has reached the question has held that "a complaint which charges abuse of the extradition power by noncomplaince with applicable law states a claim under 42 U.S.C. §1983." Sanders v. Conine, 506 F.2d 530, 532 (10th Cir. 1974).[14/]

14/ Accord, Adams v. Cuyler, 592 F.2d 720 (3rd Cir. 1979), cert. granted, 48 U.S.L.W. 3513 (Feb. 19, 1980); Wirth v. Surles, 562

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A number of other federal statutes have provided the basis for a §1983 cause of action. See, e.g., Chase v. McMasters, 573 F.2d 1011 (8th Cir. 1978), cert. denied, 439 U.S. 965 (1978) (Indian Reorganization Act of 1934); Gomez v. Florida St. Employment Service, 417 F.2d 569 (5th Cir. 1969) (Wagner-Peyser Act); Bomar v. Keyes, 162 F.2d 136 (2d Cir. 1947), cert. denied, 332 U.S.

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F.2d 319 (4th Cir. 1977), cert. denied, 435 U.S. 933 (1978); McBride v. Soos, 594 F.2d 610 (7th Cir. 1979); Pierson v. Grant, 357 F.Supp. 397 (N.D. Iowa 1973), aff'd on other grounds, 527 F.2d 161 (8th Cir. 1975). Cf. Raffone v. Sullivan, 436 F.Supp. 939 (D. Conn. 1977), remanded, 595 F.2d 1209 (2d Cir. 1979); United States ex. rel. Bryant v. Shapp, 423 F.Supp. 471 (D. Del. 1976); Hines v. Guthrey, 342 F.Supp. 594 (W.D. Va. 1972); Johnson v. Buie, 312 F.Supp. 1349 (W.D. Mo. 1970). Significantly, the courts in Raffone, Shapp, Hines, and Johnson did not find that §1983 was not available to redress infringements of federal statutes. Instead, those courts denied the §1983 claims because "the rights granted under the Federal provisions for extradition are granted to the states rather than to the fugitives...." Johnson, 312 F.Supp. at 1351.

825 (1947) (Judiciary Act);[15/] Mathes v. Nugent, 411 F.Supp. 968 (N.D. Ill. 1976) (Wagner-Peyser Act); RCA Del Caribe, Inc. v. Silva Recio, 429 F.Supp. 651 (D.P.R. 1976) (Title VII); Lamb Enterprises, Inc. v. Kiroff, 399 F.Supp. 409 (N.D. Ohio 1975), reversed on other grounds, 549 F.2d 1052 (6th Cir. 1977), cert. denied, 431 U.S. 968 (1977) (22 U.S.C. §1738); Bartels v. Biernat, 405 F.Supp. 1012 (E.D. Wisc. 1975) (Urban Mass Transportation Act; Rehabilitation Act of 1973); Giguere v. Affleck, 370 F.Supp. 154 (D.R.I. 1974) (Food Stamp Act); La Raza Unida of Southern Alameda County v. Volpe, 337 F.Supp. 221 (N.D. Cal. 1971), affirmed, 488 F.2d 559 (9th Cir. 1973), cert. denied, 417 U.S. 968 (1974).

The "and laws" provision of §1983 has been invoked, as here, most often in challenges aimed at securing state compliance with the requirements of the Social Security Act. Such challenges have been upheld both

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15/ In Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530, 533 (1949), this Court noted that Bomar "was a suit to enforce rights under a federal statute. Here, as in that case, there can be no doubt that the suit was properly commenced in the federal court."

before Chapman,[16] and after.[17]

III. THE PROVISIONS OF THE CIVIL RIGHTS ATTORNEYS' FEES AWARDS ACT OF 1976 AUTHORIZE AN AWARD OF ATTORNEYS' FEES IN THIS CASE.

The State of Maine's argument that 42 U.S.C. §1988 does not authorize an award of attorneys' fees in this case stands or falls chiefly on the success of its primary argument

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16/ See, e.g., Shea v. Vialpando, 416 U.S. 251 (1974); Rosado v. Wyman, 397 U.S. 397 (1970); King v. Smith, 392 U.S. 309 (1968); Aguayo v. Richardson, 473 F.2d 1090 (2d Cir. 1973), cert. denied sub. nom. Aguayo v. Weinberger, 414 U.S. 1146 (1974); Blue v. Craig, 505 F.2d 830 (4th Cir. 1974); Anderson v. Graham, 492 F.2d 986 (8th Cir. 1973); Bond v. Stanton, 504 F.2d 1246 (7th Cir. 1974), cert. denied, 420 U.S. 984 (1975); Roselli v. Affleck, 373 F.Supp. 36 (D.R.I. 1974), aff'd on other grounds, 508 F.2d 1277 (1st Cir. 1974); Bass v. Rockefeller, 331 F.Supp. 945 (S.D.N.Y. 1971), vacated as moot, 464 F.2d 1300 (2d Cir. 1971).

17/ See, e.g., Holley v. Lavine, 605 F.2d 638, 646 (2d Cir. 1979); Louise B. v. Coluatti, 606 F.2d 392 (3d Cir. 1979); Brown v. Stanton, No. IP 78-773-C (7th Cir. Jan. 30, 1980, as amended Feb. 29, 1980)(slip op.); Dennis v. Chang, 611 F.2d 1302 (9th Cir. 1980); Tongol v. Usery, 601 F.2d 1091 (9th Cir. 1979).

that §1983 does not apply to claims based on abridgement of federal statutory rights other than a narrow and undefined category of "civil rights." We have addressed and refuted that argument above. But its brief can also be read to suggest that even if the Thiboutots properly prevailed under §1983, the Civil Rights Attorneys' Fees Awards Act was not meant to authorize attorneys' fees in all 1983 actions, but only in actions for the enforcement of "civil" (e.g., non-Social Security Act) rights.[18] This argument is contrary to the unambiguous language of §1988 and contradicted by its legislative history.

The Civil Rights Attorneys' Fees Awards Act of 1976, Public Law 94-559, codified in 42 U.S.C. §1988, authorizes a court to award

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18/ Maine does not challenge the applicability of §1988 to state court proceedings. Every state court which has reached the question has accepted without hesitation the applicability of §1988. Young v. Toia, 66 A.D. 2d 377, 413 N.Y.S. 2d 530 (1979); Tobeluk v. Lind, 589 P.2d 873 (Alaska 1979); Ramirez v. County of Hudson, 169 N.J. Super. 455, 404 A.2d 1271 (Sup. Ct. Ch. Div. 1979); Board of Trustees v. Holso, 584 P.2d 1009 (Wyo. 1978), Harradine v. Board of Supervisors, 48 U.S.L.W. 2601 (N.Y. Sup. Ct., App. Div. 4th Dept., March 18, 1980).

reasonable attorneys' fees to the prevailing party "in any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, 1980, and 1981 of the Revised Statutes...."[19/] Thus, by its clear terms, the Act authorizes courts to award attorneys' fees in this case, which was brought under §1983. The constitutionality of §1988 was upheld by this Court in Hutto v. Finney, 437 U.S. 678 (1978). The legislative history in both the Senate and the House makes clear beyond doubt that §1988 authorizes an attorneys' fee award in this case.

The Senate Judiciary Committee Report which accompanied the Fees Act, in discussing the inconsistency of existing attorneys' fees statutes, stated that "fees are allowed in a suit under Title II of the 1964 Civil Rights Act challenging discrimination in a private restaurant, but not in suits under 42 U.S.C. §1983 redressing violations of the Federal Constitution or laws by officials sworn to uphold the laws." S.Rep. No. 94-1011, 94th Cong., 2d Sess., reprinted in 5 U.S. Code Cong. & Ad.

19/ R.S. §1979 is identical to 42 U.S.C. §1983. See generally Chapman v. Houston Welfare Rights Organization, 441 U.S. at 624.

News 5908, 5911 (1976)(emphasis added).[20/]

In the debate which preceded passage of the Fees Act in the Senate, Sen. Tunney, author of the fees legislation, explained the broad purpose of the statute:

> When Congress calls upon citizens--either explicitly or by construction of its statutes--to go to court to vindicate its policies and benefit the entire nation, Congress must also ensure that they have the means to go to court, and to be effective once they get there.

122 Cong. Rec. 33313 (1976).

Sen. Kennedy also spoke in broad terms of the need to provide protection for statutory rights:

> That Congress must act to provide means for citizens to enforce laws that are enacted for their protection can no longer be disputed. It has already included provisions for awards of attorneys' fees in over 50 statutes....

Sen. Kennedy, whom Maine here correctly described as a "primary supporter of the bill" (Pet. Br. at 21), proceeded to list "examples of conduct which this bill would help redress." Id. at 33314. Although Maine

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20/ Rep. Seiberling repeated the same statement just prior to House passage of the Senate bill. 122 Cong. Rec. 35128 (1976).

in its brief purports to reproduce that list of cases (Pet. Br. at 21-22), it omits, significantly, Bond v. Stanton, 504 F.2d 1246 (7th Cir. 1974), cert. denied, 420 U.S. 984 (1975), a §1983 statutory case which Kennedy characterized as one in which "officials accepted Social Security Act funds for years for certain medical screening programs when in fact they had no such programs in most of the State." Id.[21/] Sen. Kennedy also

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21/ Bond was a class action suit brought under 42 U.S.C. §1983 and 28 U.S.C. §1331 to enforce state compliance with the Social Security Act. No constitutional claim was asserted. The District Court held that, pursuant to 42 U.S.C. §1983 and Rosado, "this court has the power to review state welfare provisions and to prohibit the state use of any federal funds for non-compliance with statutory regulations and can enjoin the state from further use of federal funds." Bond v. Stanton, 372 F.Supp. 872, 875 (N.D. Ind. 1974). The Seventh Circuit, citing Rosado and King v. Smith, affirmed. 504 F.2d at 1251. The Seventh Circuit also upheld the District Court's bad faith award of attorneys' fees against defendants. Bond v. Stanton, 528 F.2d 688 (7th Cir. 1976). The Supreme Court vacated that judgment and remanded the case "for further consideration in light of" the Fees Act. 429 U.S. 973 (1977). On remand, the Seventh Circuit, holding that it is "clear that Congress

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included in his brief list of examples La Raza Unida v. Volpe, 57 F.R.D. 94 (N.D. Cal. 1973), another wholly statutory §1983 action.[22/]

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intended that the act extend to statutory claims asserted under §1983," and citing to Sen. Kennedy's remarks, affirmed the District Court's award of attorneys' fees pursuant to the Fees Act. Bond v. Stanton, 555 F.2d 172, 174 (7th Cir. 1977), cert. denied, 438 U.S. 916 (1978).

22/ The Court in La Raza found a violation of the provisions of the Relocation Assistance Act. As in Bond, the plaintiffs in La Raza were eventually awarded attorneys' fees pursuant to the Fees Act. La Raza Unida v. Volpe, 440 F.Supp. 904 (N.D. Cal. 1977). The La Raza case generated considerable Congressional interest. See Hearings on Legal Fees, Part III: Court Awards of Attorneys' Fees to the Prevailing Party in Litigation Before the Subcommittee on Representation of Citizen Interests of the Senate Committee on the Judiciary, 93rd Cong., 1st Sess. 787-800, 857-858, 1116-1119, 1326 (1973). Senator Tunney, Chairman of the Subcommittee and author of the Fees Act, opened those hearings by remarking that:

> Congress has enacted needed legislation affording citizens important rights in many areas. All too often, however, not enough attention has been given to the problem of enforcing these rights.

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Sen. Kennedy further commented that "...in each of these cases, the victim...had to go to court to enforce the rights promised by Congress or by the Constitution." Id. (Emphasis supplied). The inclusion by Kennedy of two §1983 claims involving rights secured by "laws" other than simply "equal rights" laws in his list of ten examples of cases covered by the Act belies Maine's contention that Congress intended §1988 to reach only constitutional, or other "traditional civil rights," claims.

Conclusive evidence that the Senate intended §1988 to apply to all claims cognizable under §1983 is provided by the final statements of the bill's floor manager in the Senate, Senator Abourezk, only moments prior to passage of the bill:

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> Without effective enforcement, rights are but a hollow declaration lacking any substantive effect.

Id. at 787. In partial answer to his own question, "Where are the attorneys to enforce these statutory rights?", Tunney introduced, as the first witness, the plaintiff's attorney in La Raza. Id.

> This legislation is intended to cover cases based on both constitutional and statutory rights, including Supremacy Clause cases. See 42 U.S.C. §1983.

122 Cong. Rec. 33315 (1976).

In introducing the Senate version of the Fees Act in the House, Rep. Drinan, a primary sponsor of the identical House legislation, set out "the scope of the covered statutes." 122 Cong. Rec. 35122 (1976). Section 1983, Drinan stated,

> protects civil and constitutional rights from abridgement by state and local officials...Under applicable judicial decisions, Section 1983 authorizes suits against State and local officials based upon Federal statutory as well as constitutional rights. For example, Blue against Craig, 505 F.2d 830 (4th Cir. 1974).[23]

The House passed the Senate bill shortly after Drinan completed his remarks. Id. at 35130.

The statements of sponsors of the Fees Act in both the House and the Senate just prior to passage of the Act that §1988 was intended to apply to suits brought under §1983 to redress infringements of Federal statutory rights, and specifically rights

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[23] Blue v. Craig was a §1983 action based on a state violation of the Social Security Act. See n.13, supra.

granted by the Social Security Act, should be "accorded substantial weight in interpreting the statute." FEA v. Algonquin Sng, Inc., 426 U.S. 548, 564 (1976). "Where the statutory language and the legislative history clearly indicate the purpose of Congress, that purpose must be upheld." Hudson Distributors v. Eli Lilly & Co., 377 U.S. 386, 395 (1964).

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Judicial Court of Maine should be affirmed.

Respectfully submitted,

CHARLES S. SIMS
BRUCE J. ENNIS
c/o American Civil
Liberties Union
Foundation
132 West 43rd St.
New York, N.Y. 10036

Attorneys for Amici Curiae*

March 28, 1980

* Counsel gratefully acknowledge the substantial assistance of Steven Perry, a second-year law student at the Yale Law School, in the research and preparation of this brief.

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No. 79-838

STATE OF MAINE AND MICHAEL R. PETIT, COMMISSIONER OF THE DEPARTMENT OF HUMAN SERVICES, STATE OF MAINE,
Petitioners

v.

JOLINE THIBOUTOT AND LIONEL THIBOUTOT AND ON BEHALF OF OTHERS SIMILARLY SITUATED,
Respondents

BRIEF FOR AMICUS CURIAE ON WRIT OF CERTIORARI FROM THE JUDGMENT OF THE SUPREME JUDICIAL COURT OF THE STATE OF MAINE

ROBERT E. KELLY
Deputy Attorney General
ALLEN C. WARSHAW
Deputy Attorney General
Chief, Civil Litigation
EDWARD G. BIESTER, JR.
Attorney General
Attorneys for Amicus Curiae
Department of Justice
Commonwealth of Pennsylvania
16th Floor Strawberry Square
Harrisburg, Pennsylvania 17120
(717) 783-1471

Murrelle Printing Co., Box 100, Sayre, Pa. 18840—(717) 882-0401

James A. Redden, Atty. Gen.
Walter L. Barrie, Sol. Gen.
100 State Office Bldg.
Salem, OR 97310

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INTEREST OF AMICI

The Commonwealths of Pennsylvania and Massachusetts and the States of New Hampshire, New Jersey, Rhode Island, Vermont and Delaware sponsored by their Attorneys General file this brief *amici curiae* in this matter in support of petitioners, the State of Maine and Michael R. Petit.

The question presented in this case is whether Section 1 of the Civil Rights Act of 1871 (often referred to as the Ku Klux Klan Act of 1871), now codified in 42 U.S.C. §1983, provides a cause of action for a violation of the Social Security Act and, by extention, of any federal statute. This question has wide-ranging impact on the *amici* as well as all other State and local governmental units. A sweeping view of Section 1983 which provides a cause of action for violations of all federal statutes would subject State and local governments to suit under Section 1983 whenever *any* federal statute is alleged to have been violated by State or local officials.

Further, the application of the attorney's fees provision of 42 U.S.C. §1988 to suits under Section 1983 creates additional, and not insignificant, financial burdens on *amici* and all State and local governments in matters where it simply was not intended to apply.[1]

[1] In December, 1977, the National Association of Attorneys General adopted a resolution entitled "Opposition of Awards of Attorney's Fees against States", in which the fiscal impact of such awards on state treasuries was raised.

ARGUMENT

I.

Section 1983 Provides a Cause of Action Only for Violations of Constitutionally-Protected Rights and Not for Violations of All Federal Statutes

Ever since this Court's decision in *King v. Smith,*[2] 392 U.S. 309 (1968), this Court, as well as the vast majority of lower courts, have "uncritically" assumed that 42 U.S.C. §1983 (1974)[3] provides a cause of action for a broad range of federal statutory, as well as constitutional, claims. *See, e.g., Miller v. Youakim,* 440 U.S. 125 (1979) (Aid to Families with Dependent Children-Foster Care Program); *Edelman v. Jordan,* 415 U.S. 651 (1974) (Aid to Aged, Blind and Disabled); *Hagans v. Lavine,* 415 U.S. 528 (1974) (Aid to Families with Dependent Children ("A.F.D.C."); *Dandridge v. Williams,* 397 U.S. 471 (1970) (A.F.D.C.); *Louise B. v. Colautti,* 606 F.2d 392 (3d Cir. 1979) (A.F.D.C.); *Tongal v. Usery,* 601 F.2d

[2] *See Chapman v. Houston Welfare Rights Organization,* 441 U.S. 600, 644 (1979) (Powell, J., concurring).

[3] 42 U.S.C. §1983 (1974) reads:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

1091 (9th Cir. 1979) (Emergency Unemployment Compensation Act of 1974); *Blue v. Craig,* 505 F.2d 830 (4th Cir. 1974) (Title XIX of the Social Security Act (Medical Assistance)); *Gomez v. Florida State Employment Service,* 417 F.2d 569 (5th Cir. 1969) (Wagner-Peyser Act of 1933).

This case presents the question of whether Section 1983 provides a cause of action specifically for claims under the Social Security Act and generally for claims under all federal statutes. The question now before this Court was the subject of concurring opinions by Justices White and Powell last term in *Chapman v. Houston Welfare Rights Organization,* 441 U.S. 600 (1979). It is now time to look at this important, yet long-unanswered, question.[4] It is *amici's* position that Section 1983 provides a cause of action only for violations of constitutional or civil rights[5] and not for violations of every federal statute. For this Court to view Section 1983 as furnishing a cause of action for violations of every federal statute would be to

[4] This Court has indicated on a number of occasions its recognition that it has never definitively answered the question now before it—whether Section 1983 creates a private cause of action for claims under the Social Security Act and all Federal statutes. *See Southeastern Community College v. Davis,* 99 S.Ct. 2361, 2366 n. 5 (1979); *Cannon v. University of Chicago,* 441 U.S. 677, 700 n. 27 (1979); *Hagans v. Lavine,* 415 U.S. 528, 533 n. 5 (1974). *See also Burks v. Lasker,* 441 U.S. 471, 476 n. 5 (1979) ("The question whether a cause of action exists is not a question of jurisdiction, and therefore may be assumed without being decided.")

[5] The history of Sections 1983 and 1343 make clear that Congress viewed "constitutional" rights and "civil" rights as conceptually identical, i.e., providing for the fundamental rights of the citizens of the nation. *See Chapman v. Houston Welfare Rights Organization,* 441 U.S. at 632-33 and n. 14, 640 n. 24. (Powell, J., concurring).

create federal causes of action where none previously existed.

This Court has extensively discussed and analyzed the legislative history of Section 1983 on numerous occasions in recent years. *See, e.g., Chapman v. Houston Welfare Rights Organization, id.; Monell v. Department of Social Services of the City of New York,* 436 U.S. 658 (1978); *Examining Board of Engineers, Architects and Surveyors v. Flores De Otero,* 426 U.S. 572 (1976); *Lynch v. Household Finance Corporation,* 405 U.S. 538 (1972); *Monroe v. Pape,* 365 U.S. 167 (1961). The one theme that runs throughout these and other cases is that Section 1983 was enacted to safeguard the constitutional rights guaranteed to the citizens of the United States by the Fourteenth Amendment. *See District of Columbia v. Carter,* 409 U.S. 418, 423 (1973).

The present Section 1983 has its origin in Section 1 of the Ku Klux Klan Act of April 20, 1871, 17 Stat. 13.[6] *See Examining Board of Engineers, Artchitects and Surveyors v. Florees De Otero,* 426 U.S. at 581. It was one means by which Congress exercised its newly-vested power of Section 5 of the Fourteenth Amendment. *Monroe v. Pape,* 365 U.S. at 171.

The purpose of Section 1 of the Ku Klux Klan Act, now Section 1983, is clear from the title of the legislation: "An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes." *Monroe v. Pape, id.* at 171. The "other purposes" were intended primarily to deal with sup-

[6] The Ku Klux Klan Act of 1871, in turn, traces its origin to Section 2 of the Civil Rights Act of 1866, 14 Stat. 27. *See Chapman v. Houston Welfare Rights Organization,* 441 U.S. at 627-28.

pressing Ku Klux Klan violence in the South. *Monell v. Department of Social Services of the City of New York,* 436 U.S. at 665.

What Congress had in mind when it passed Section 1983 was to provide first, a remedy against invidious, discriminatory legislation, second, a remedy where State law was inadequate, and finally, a remedy against the failure of State or local officials to enforce the law with an equal hand—*i.e.,* violations of the Fourteenth Amendment. *See Monroe v. Pape, id,* at 173-75.[7]

Section 1 of the Ku Klux Klan Act of 1871, then, provided only for a cause of action for a deprivation under color of state law of "any rights, privileges or immunities secured by the Constitution of the United States". This is clear from the language of the statute and even more so from the Congressional intent behind the Act.

The phrase "and laws", around which this controversy revolves, was not added until 1874 as part of the statutory codification process then underway. This phrase

[7] Mr. Blanchard from Illinois, described the situation giving rise to the Civil Rights Act of 1871:

> "If the State Legislature pass a law discriminating against any portion of its citizens, or if it fails to enact provisions equally applicable to every class for the protection of their person and property, it will be admitted that the State does not afford the equal protection. But if the statutes show no discrimination, yet in its judicial tribunals one class is unable to secure that enforcement of their rights and punishment for their infraction which is accorded to another, or if secret combinations of men are allowed by the Executive to ban together to deprive one class of citizens of their legal rights without a proper effort to discover, detect, and punish the violations of law and order, the State has not afforded to all its citizens the equal protection of the laws."

was apparently added without any congressional activity or explanations. *See Examining Board of Engineers, Architects and Surveyors v. Flores De Otero,* 426 U.S. at 583 n. 12; Note, Federal Jurisdiction over Challenges to State Welfare Programs, 72 Colum. L. Rev. 1404, 1418 (1972). Justice Powell's concurring opinion in *Chapman v. Houston Welfare Rights Organization,* 441 U.S. at 623-46, demonstrates that the purpose and legislative history of Section 1983 as well as the rules of proper statutory construction all impel the conclusion that the "and laws" phrase cannot be viewed as quietly and explosively creating a private cause of action for all federal statutes. There simply is no support in the Congressional history of the Civil Rights Acts of 1866, 1870 and 1871 for such a view. Moreover, an amendment of the magnitude involved in creating a private cause of action for all federal statutes could not have been accomplished as unceremoniously as the "and laws" was added to Section 1983.

Today we are accustomed to federal court involvement in many aspects of our day-to-day lives; however, in 1874 the concept of wide-ranging federal court jurisdiction was still a nascent concept. *See generally Mitchum v. Foster,* 407 U.S. 225, 239-42 (1972). For Congress to have intended the "and laws" phrase to create a private cause of action in the federal courts for all federal statutes would most certainly have caused more discussion and debate than that engendered by the 1874 statutory revision. The only reasonable interpretation of the "and laws" phrase is that it was intended to go no further than the original purpose of Section 1 of the Ku Klux Klan Act—*i.e.,* to refer to violations of the basic rights guaranteed by

Cong. Globe, 42 Cong., 1st Sess. 653, *quoted in Monroe v. Pape,* 365 U.S. at 176-77.

the Fourteenth Amendment.[8] There is absolutely no indication in the legislative history of Section 1983 that Congress envisioned creating a private right of action for every federal statute regardless of any connection with a violation of a constitutionally-protected right. Such an increase in the jurisdiction of the federal courts cannot be lightly inferred.

Justice White's concurring opinion in *Chapman v. Houston Welfare Rights Organization,* 440 U.S. at 646-72 (1979), as well as that of the dissenting justices rely heavily on the "view repeatedly stated in previous cases that §1983 encompasses federal statutory as well as constitutional" claims, *id.* at 658. However, a close analysis of those cases reveals that the question now before this Court has not yet been definitively answered.

In *King v. Smith,* 392 U.S. 309 (1968), the claim under Section 1983 averred both constitutional as well as statutory violations. Likewise in *Rosado v. Wyman,* 397 U.S. 397 (1970), the statutory claim was presented as pendent to an equal protection claim. In *Dandridge v. Williams,* 397 U.S. 471 (1970), plaintiffs brought suit to enjoin a Maryland welfare regulation on the basis that it conflicted with the Social Security Act and the Fourteenth Amendment. 397 U.S. at 473. In *Edelman v. Jordan,* 415 U.S. 651 (1974), plaintiffs' complaint alleged claims under the Fourteenth Amendment and the Social Security Act. This Court noted that the district court exercised ju-

[8] This Court has recognized, in other contexts, that Section 1983 applies only to the fundamental rights protected by the Fourteenth Amendment. *See Martinez v. California,* 48 U.S.L.W. 4076, 4078 (Jan. 15, 1980) (". . . it is perfectly clear that not every injury in which a state official has played some part is actionable under [Section 1983]"); *Paul v. Davis,* 426 U.S. 693 (1976).

risdiction over the statutory claim pendent to the constitutional claim. 415 U.S. at 653 n. 1.[9] Most recently in *Miller v. Youakim,* 440 U.S. 125 (1979), the plaintiffs' complaint averred that the challenged Illinois foster care payment scheme violated the Equal Protection Clause as well as the Social Security Act. *Id.,* 425 U.S. 231, 232-33 (1976).

Indeed, many of this Court's opinions contain language suggesting that Section 1983 applies only to constitutional claims. In *Moore v. County of Alameda,* 411 U.S. 693 (1973), this Court stated that Section 1983 "was intended to provide private parties a cause of action for abuses of official authority which resulted in the deprivation of constitutional rights, privileges and immunities". 411 U.S. at 699. *See also Quern v. Jordan,* 440 U.S. 332, 354 (1979) (Brennan, J., concurring) (Section 1983 enacted to enforce the Fourteenth Amendment; *Monell v. Department of Social Services of City of New York,* 436 U.S. 658, 690-91 (1978).

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[9] The Court in *Edelman* cited with approval its substantiality doctrine enunciated in *Hagans v. Lavine,* 415 U.S. 528 (1974). Although *Hagans* is often cited in support of the view that Section 1983 applies to all statutory claims, it would actually appear to support petitioner's position.

The Court in *Hagans* approved of the practice of asserting jurisdiction over a not wholly insubstantial constitutional claim and then deciding the merits of the case on the pendent statutory claim. This rule certainly leads one to wonder why there need be the use of pendent jurisdiction under the constitutional claim, if the statutory claim stated a cause of action and was within the court's jurisdiction in its own right. If anything, *Hagans* would seem to stand for the proposition that Section 1983 claims for violations of the Social Security Act do not state a cause of action and federal courts lack jurisdiction over any such claims.

Furthermore, the legislative history of Section 1983 and its jurisdictional counterparts demonstrates that Congress intended to provide federal jurisdiction for causes of action authorized under Section 1983. But after this Court's decision in *Chapman v. Houston Welfare Rights Organization,* 441 U.S. at 623, there is no federal jurisdiction for non-constitutional federal claims, such as violations of the Social Security Act. Consequently, a decision that Congress intended the phrase "and laws" to refer to all federal statutes would result in the anomalous situation where a federal court lacks jurisdiction over a cause of action under the Civil Rights Act of 1871. Eight members of this Court have either explicitly or implicitly rejected this possibility. *Chapman v. Houston Welfare Rights Organization,* 441 U.S. at 616-20 (Stevens, J.); 645-46 (Powell, J., concurring); 674 (Stewart, J., dissenting). As Justice Stewart correctly pointed out " 'the common origin of §§1983 and 1343(3) in §1 of the Civil Rights Act of 1871 suggests that the two provisions were meant to be, and are, complementary.' [quoting] Examining Board v. Flores de Otero, 426 U.S. 572, 583." *Id.* at 674.

In order to maintain the Congressionally-intended parity between Section 1983 and its jurisdictional counterpart, the "and laws" phrase can only refer to statutes enacted to protect rights protected by the Fourteenth Amendment.

Moreover, there is no need to apply Section 1983 to all federal statutes to provide a private right of action for violations "under color of law". Congress and this Court have the ability and tools to determine which federal statutory rights are to be subject to a private right of action without resort to the overextension or bootstrapping of Section 1983.

This Court has often examined statutes to ascertain whether a private right of action has been provided to sue for a violation of that statute. In *Cort v. Ash*, 422 U.S. 66 (1975), this Court reviewed this area of the law and gleaned four basic factors to be utilized in determining whether a private right of action is implicit in a statute not expressly providing one.[10]

Since its decision in *Cort v. Ash*, this Court has applied these factors in a number of cases.[11] The *Cort* implied-right-of-action analysis is a workable and practical tool to determine whether Congress intended to provide a private right of action in a particular statute. There is no reason why this analysis cannot and should not be applied to the Social Security Act and other federal statutes instead of expanding Section 1983 beyond its intended purpose.

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[10] The four factors are:

(1) Whether the plaintiff is one of the class for whose special benefit the statute was enacted;

(2) Whether there is any legislative intent to create or deny such a remedy;

(3) Whether it is consistent with the underlying legislative scheme to imply such a remedy; and

(4) Whether the cause of action is one traditionally relegated to State law and therefore inappropriate to infer a federal cause of action?

422 U.S. at 78. *See Cannon v. University of Chicago*, 441 U.S. 677, 689-709 (1979).

[11] During this term and last term, this Court applied the implied right of action rule in a number of cases. *See Transamerica Mortgage Advisors, Inc. v. Lewis*, 100 S.Ct. 242 (1979); *Touche Ross & Co. v. Redington*, 99 S.Ct. 2479 (1979); *Cannon v. University of Chicago*, 441 U.S. 677 (1979); *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979). *See also Southeastern Community College v. Davis*, 99 S.Ct. 2361 (1979); *Davis v. Passman*, 99 S.Ct. 2264 (1979); *Burks v. Lasker*, 441 U.S. 471 (1979).

Congress, too, can readily indicate whether it intends to create a private cause of action when it enacts a particular statute. Certainly Congress has done so in the past. *See, e.g.*, Age Discrimination in Employment Act of 1967, Pub. L. 93-259, *as amended*, 29 U.S.C. §626 (Supp. 1979); Civil Rights Act of 1964, Title II & VII, Pub. L. 88-352, *as amended*, 42 U.S.C. §§2000a-3, 2000e-5 (1974); Communications Act of 1934, 48 Stat. 1964, *as amended*, 47 U.S.C. §207 (1962); Crime Control Act of 1979, Pub. L. 91-452, 18 U.S.C. §1964 (Supp. 1979); Securities and Exchange Act of 1934, 48 Stat. 881, *as amended*, 15 U.S.C. §78r (1971); Vietnam Era Veteran Readjustment Assistance Act of 1974, Pub. L. 93-508, *as amended*, 38 U.S.C. §2022 (1979).

If Section 1983 applies to a violation of all federal statutes, then the framework of many pieces of legislation which Congress has carefully designed to meet the complexities peculiar to individual acts may be disrupted. *See* Note, *The Proper Scope of the Civil Rights Acts*, 66 Harv. L. Rev. 1285, 1290-92 (1953). For example, under the overextended view of Section 1983, violations of the National Labor Relations Act, 49 Stat. 449, *as amended*, 29 U.S.C. §§151, 160 (1973), may be subject to a private cause of action under Section 1983. Similarly, the procedures designed in Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, could be bypassed by a suit under Section 1983. Again, in light of these and other Congressional actions subsequent to the enactment of Section 1983 it seems very unlikely that the "and laws" phrase was intended to apply to violations of all federal statutes regardless of whether the statute dealt with a constitutionally-protected right.

There may be also instances where Congress does not desire a private cause under a particular statute but wishes to rely on the enforcement mechanism provided by the statutory framework. To permit Section 1983 to create a private cause of action for violations of those statutes would act to frustrate the congressionally-designed framework. *See National Railroad Passenger Corp. v. National Association of Railroad Passengers,* 414 U.S. 453, 458 (1974).

Finally, the legislative history of the Civil Rights Attorney's Fees Awards Act of 1976, Publ. L. 94-559, 42 U.S.C. §1988 (Supp. 1979), the most recent congressional activity relating to Section 1983, makes clear that Congress views that section as an act providing a remedy for deprivations of constitutionally-protected rights. *See* Sen. Rep. No. 94-1011, 94 Cong., 2d Sess., *reprinted in* [1976] U.S. Code Cong. & Ad. News 5908. The driving force behind this Act was to make it economically feasible for citizens to vindicate their "civil rights" against those who violate "the Nation's fundamental laws". *Id.* at 5910. The emphasis was on providing a vehicle to facilitate and encourage vindication of the essential rights of citizens of this country—*i.e.,* constitutionally-protected rights. Nowhere is there a hint that Congress viewed Section 1983 as providing a private right of action for violations of all federal statutes regardless of any connection with constitutional rights.

For these reasons, respondents' claim of violations of the Social Security Act does not state a cause of action cognizable under Section 1983 and the Supreme Judicial Court of Maine erred in ruling that respondents had such a cause of action.

II.

The Attorney's Fees Provision of Section 1988 Was Not Intended To Apply to Actions in State Courts

This case raises the additional question of whether Congress intended 42 U.S.C. §1988 to be applied in State court actions. The legislative history of Section 1988 indicates that it does not.

The purpose of the 1976 amendment to Section 1988 was "to remedy anomolous gaps in our civil rights laws created by the United States Supreme Court's recent decision in Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975). . . ." S. Rep. No. 94-1011, 94th Cong., 2d Sess. 1, *reprinted in* [1976] U.S. Code Cong. & Ad. News at 5909. In *Alyeska,* this Court simply placed in historical perspective the inability of federal courts to tax costs, such as attorneys fees, in the absence of specific congressional authority.[12] Congress only intended to address the technical requirement laid down in *Alyeska,* and did not intend to create a "startling new remedy". S. Rep. No. 94-1011 at 6, *id.* at 5913. In fact, the Act itself amended 42 U.S.C. §1988, a statute which otherwise deals exclusively with the procedures which federal courts are to use in civil rights cases.[13]

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[12] "Since the approach taken by Congress to this issue has been to carve out specific exceptions to a general rule that *federal courts* cannot award attorneys' fees . . . , those courts are not free to fashion drastic new rules with respect to the allowance of attorneys' fees to the prevailing parting in *federal litigation. . . .*" *Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U.S. at 269 (emphasis added).

[13] *See Robertson v. Wegmann,* 435 U.S. 584 (1978); *Moore v. County of Alameda,* 411 U.S. 693, 702 (1973); *Veres v. County of*

Since the Congress intended only to deal with gaps left by *Alyeska* (S. Rep. No. 94-1011 1; H. Rep. No. 94-1558, 94th Cong., 2d Sess. 2 (1976)) and since *Alyeska* was decided by this Court in its supervisory powers over *federal* courts, it stands to reason that Section 1988 was never intended to authorize a State court to award attorney's fees to prevailing parties absent independent authorization by the State legislature. The remarks of nearly every member of Congress addressing the debate over the Section 1988 amendments were clear in their intent that they were addressing only an issue of costs as they relate to federal courts.[14] This interpretation of Section 1988 is consistent with the position taken by this Court as to other federal claims when filed and tried in State courts. In a long line of cases, this Court has ruled that State courts are free to determine their own methods of procedure and practice in the trial of suits arising under federal law, so long as the procedure does not directly effect the claim.[15] *See Brown v. Western Railway,* 338 U.S.

Monroe, 364 F. Supp. 1327, 1329 (E.D. Mich. 1973), *aff'd,* 542 F.2d 117 (6th Cir. 1976), *cert. denied,* 431 U.S. 969 (1977). ("Thus, §1988 is procedural only, and does not create a substantive cause of action for violation of federal civil rights.")

[14] *See, e.g.,* 122 Cong. Rec. 31471 (1976) (remarks of Sen. Mathias); 122 Cong. Rec. 31472 (remarks of Sen. Kennedy). *But see* 122 Cong. Rec. 12159 (remarks of Rep. Dunan).

[15] Notwithstanding the lack of any congressional intent to apply the attorney's fees provisions of Section 1988 to State court actions, there is the additional problem of the authority of Congress to authorize an award of fees against States in cases involving non-constitutional claims, such as this.

In *Hutto v. Finney,* 437 U.S. 678 (1978), the Court stated that Congress had the power to set aside the States' Eleventh Amendment immunity in order to enforce the Fourteenth Amendment which guarantees to citizens of this Nation the rights provided by that Amendment. *Id.* at 693. However, in *National League of Cities v. Usery,* 426 U.S. 833 (1976), the Court held that Congress may not exercise its power under the Commerce Clause to abridge rights reserved to the States by the Tenth Amendment. *Id.* at 854. A comparison of these cases supports the conclusion that Congress could only override the States' immunity in cases involving constitutional violations. Here, on the contrary, the alleged violation is of the Social Security Act and not the Constitution and therefore does not fall within the powers granted to Congress in Section 5 of the Fourteenth Amendment.

294 (1949); *Garrett v. Moore-McCormack Co.,* 317 U.S. 239 (1942); *New Orleans and Northwestern Railroad Company v. Harris,* 247 U.S. 367 (1918); *Central Vermont Rwy. Co. v. White,* 238 U.S. 507 (1915).

Thus, the attorney's fees provisions of Section 1988 were simply not intended to apply to actions in State court and the Supreme Judicial Court of Maine erred in awarding fees in this State court action under Section 1988.

CONCLUSION

For the foregoing reasons, Amici respectfully request that this Court reverse the August 31, 1979 Order of the Supreme Judicial Court of the State of Maine.

Respectfully submitted,

ROBERT E. KELLY
Deputy Attorney General
ALLEN C. WARSHAW
Deputy Attorney General
Chief, Civil Litigation
EDWARD G. BIESTER, JR.
Attorney General
COMMONWEALTH OF PENNSYLVANIA
Attorneys for Amicus Curiae

Department of Justice
Commonwealth of Pennsylvania
16th Floor Strawberry Square
Harrisburg, PA 17120
(717) 783-1471

Additional Counsel for Amici:

Francis X. Bellotti
Attorney General
Garrick F. Cole
Assistant Attorney General
Department of the Attorney General
One Ashburton Pl.
Boston, MA 02108
(617) 727-1038

John J. Degnan
Attorney General
Andrea Silkowitz
Deputy Attorney General
Dept. of Law & Public Safety
2nd Fl., State House Annex
Trenton, NJ 08625
(609) 292-4925

Thomas D. Rath
Attorney General
208 State House Annex
Concord, NH 03301
(603) 271-3658

M. Jerome Diamond
Attorney General
Benson Scotch
Assistant Attorney General
Pavilion Office Bldg.
Montpelier, VT 05602
(802) 828-3171

Dennis J. Roberts, II
Attorney General
Allen P. Rubine
Deputy Attorney General
John S. Foley
Special Assistant Attorney Gen.
Eileen G. Cooney
Special Assistant Attorney Gen.
Providence County Courthouse
Providence, RI 02903
(401) 831-6850

Richard S. Gebelein
Attorney General
Regina M. Small
State Solicitor
Department of Justice
Wilmington State Office Bldg.
820 N. French Street
Wilmington, Delaware 19801
(302) 571-2520

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OCTOBER TERM, 1979

No. 79-838

STATE OF MAINE AND MICHAEL R. PETIT,
COMMISSIONER OF THE DEPARTMENT OF HUMAN
SERVICES, STATE OF MAINE,
Petitioners,

v.

JOLINE THIBOUTOT AND LIONEL THIBOUTOT,
AND ON BEHALF OF OTHERS SIMILARLY SITUATED,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT
OF THE STATE OF MAINE

BRIEF OF AMICI CURIAE VOLUNTEER LAWYERS PROJECT OF THE BOSTON BAR ASSOCIATION AND LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW OF THE BOSTON BAR ASSOCIATION.

CAROL GOODMAN
SAMUEL HOAR
GOODWIN, PROCTER & HOAR,
28 State Street,
Boston, Massachusetts 02109.
Attorneys for Amici Curiae

Of Counsel:
KENNETH W. SIMONS
LEONARD G. LEARNER

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BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

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INTEREST OF THE AMICI CURIAE.

The Volunteer Lawyers Project of the Boston Bar Association ("Project") and the Lawyers' Committee for Civil Rights Under Law of the Boston Bar Association ("Lawyers' Com-

mittee") submit this amicus brief in support of the Respondents, Joline and Lionel Thiboutot and all others similarly situated.

In this case, the State of Maine ("Maine") asserts that R.S. 1979, codified as 42 U.S.C. § 1983 ("Section 1983"), does not provide a cause of action for violation of rights, privileges or immunities protected by federal law. Maine further asserts that attorneys' fee awards for plaintiffs' counsel are not available in actions brought under Section 1983 to vindicate federal statutory rights, despite the language of 42 U.S.C. § 1988 ("Section 1988").

The amici believe that the adoption of Maine's position would have a profound and damaging impact on the provision of legal services to the poor by private law firms and by projects relying on the resources of the private bar, such as amici. Maine's position would seriously impair the amici's ability to meet the legal needs of Boston's poor residents, would interfere with the efforts of amici and similar projects to fund a portion of their programs through Section 1988 fee awards, and would place a severe strain upon the resources of the private bar. In addition, adoption of Maine's interpretation would increase the cost of litigation to enforce federal statutory rights, by dramatically increasing the time such litigation would take and the scope the litigation would have to assume. This result is contrary to the interest of poor litigants, such as the Thiboutots; of pro bono publico projects, such as amici, and the private bar; of the state and federal courts; and of Maine and other states.

For the reasons set out below and in the Thiboutots' brief, the Project and the Lawyers' Committee urge this Court to affirm the decision of the Maine Supreme Judicial Court.

Description of the Amici.

The Boston Bar Association has one of the nation's most innovative and active programs for private bar involvement in pro bono publico work. The Lawyers' Committee, founded in 1968, was the first local affiliate of the National Lawyers' Committee for Civil Rights Under Law. The Lawyers' Committee has been sponsored by the Boston Bar Association since 1973.

The Boston Bar Association has developed two other distinctive projects through which private lawyers and paralegals can perform a variety of pro bono publico services. These programs were developed to implement the Association's 1977 Action Plan for Legal Services: Report on the Legal Problems of the Poor in Boston — Part 1: Civil Legal Needs ("Action Plan"), a two-year study documenting the legal needs of the poor in Boston's communities. As the Action Plan demonstrated, Boston's publicly-funded legal services offices were able to meet less than one-third of the recognized legal needs of Boston's poor. *Id.* at 6. Such legal services offices, primarily because of severe underfunding, could not provide the necessary increased level of services, and the private bar in Boston represented a substantial untapped resource for legal representation of the poor. *Id.* at 6-8.

The Volunteer Lawyers Project.

The Project was the first of the Association's programs to be implemented under the Action Plan. It was organized in January 1977. The Project operates with a volunteer attorney panel of more than 650 private attorneys. Its membership includes both recent admittees and experienced lawyers, sole practitioners, lawyers in small offices, lawyers in Boston's

largest law firms, corporate counsel — indeed, partners and associates in law offices of all sizes and kinds. Many of the Project's volunteer lawyers have actively participated in the program since its inception, and the rate of retention is exceptionally high.

The Project is funded by the federal Legal Services Corporation. Fee applications made by Project volunteer attorneys on behalf of the Project under state and federal statutes providing for fee awards, including Section 1988, will provide an increasingly significant part of the Project's funding.

Each year, the Project receives more than 5,000 requests for assistance. In 1979, approximately 2,000 clients received help with their legal problems from the Project's volunteer attorneys and staff. Each of these cases requires on the average twenty hours of lawyer time. (This average includes matters having two to three hour time commitments, such as uncontested divorces, advice-only cases and cases that are settled promptly.) In 1979, the Project thus provided over 40,000 hours of high quality, free legal services to poor people in Boston, of a total value exceeding $3 million.

The Project's caseload consists of "service" rather than law reform cases. Its panel attorneys are principally committed to representing individual clients having a variety of personal legal problems, such as housing evictions, divorces, Social Security and welfare appeals, education appeals, consumer problems — the whole panoply of legal problems afflicting poor people in Boston. Panel attorneys occasionally bring class action or law reform cases, but only where, in the judgment of the panel attorney, such litigation is necessary to secure the individual client's rights.

The Project is one of eight experimental programs in the country to receive continued funding in 1980 from the federal Legal Services Corporation. In deciding to continue financial

support of the Project, the Legal Services Corporation relied on a recent independent evaluation of the Project, which cited the Project's overwhelming success in establishing an effective delivery mechanism to complement the services provided by Boston's hard-pressed neighborhood legal services offices. Report of September 1979 Monitoring Visit by the Legal Services Corporation. The evaluation report took particular note of the Project's innovative intake and referral system and the high calibre of services provided to clients. *Id.**

The Lawyers' Committee for Civil Rights Under Law.

The Lawyers' Committee provides representation in class action and law reform cases on behalf of minorities and poor people in Boston. It is the law reform program of the Boston Bar Association and marshals the resources of over twenty Boston law firms that handle cases as law firms. Its caseload consists of complex litigation, both statutory and constitutional. The cases the Lawyers' Committee handles frequently require hundreds of hours of lawyer time.

Matters currently handled by the Lawyers' Committee include cases in the areas of housing and urban development, education, racial violence, equal employment opportunity,

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* The Association's third and newest pro bono effort is the Law Firm Resources Project, which began operation in January 1979. In this project, a number of large Boston law firms are "matched" with neighborhood law offices of Greater Boston Legal Services and provide consultation on specialized areas of law and on litigation strategy, access to forms and pleading files, advice on office and library management, use of Lexis, and lawyer, paralegal and secretarial personnel. The project enables these hard-pressed legal services offices to expand their services by using the expertise and resources of Boston's large corporate law firms. This project provides no direct client services and hence is not an amicus here.

police misconduct, and the rights of children, prisoners and the developmentally disabled.

The Lawyers' Committee receives no public funding. Its income is derived from participating law firms, the Boston Bar Association and private donations. Fee awards from successful litigation, including awards under Section 1988, are becoming a significant income source for the Lawyers' Committee.

ARGUMENT.

I. In the 1976 Amendment to Section 1988, Congress Intended to Permit Attorneys' Fee Awards in Actions to Vindicate Statutory Rights Under Section 1983.

The drafters of the 1976 amendment to Section 1988, Pub. L. No. 94-559, intended that attorneys' fee awards would be available in cases brought under Section 1983 to enforce federal statutory rights, including welfare claims, as well as racial discrimination (equal rights) and other constitutional claims.*

Thus, Representative Drinan, the sponsor of H.R. 9552, stated in the House debates that the bill would authorize the payment of counsel fees in cases to enforce federal rights "in a variety of areas, including contractual relationships, property transactions, and federally assisted programs and activities." Representative Drinan continued:

* The amici join the arguments set out in the Thiboutots' brief, which, the amici believe, establish that Section 1983 provides, as it explicitly states, a cause of action for violation under color of state law of any federal statutory right. The amici's area of concern in this brief is limited to the availability of attorneys' fees under Section 1988 and the effective use of the resources of the private bar.

> "Under applicable judicial decisions, Section 1983 authorizes suits against State and local officials *based upon federal statutory as well as constitutional rights*. For example, Blue against Craig, 505 F.2d 830 (4th Cir. 1974)." 122 Cong. Rec. 35122 (1976). (Emphasis added.) *

Subsequently, Representative Seiberling restated this proposition, quoting from the testimony of Armand Derfner of the National Lawyers' Committee, a witness at the hearings on the bill:

> "'The *Alyeska* [*Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975)] decision created an unexpected and anomalous gap in laws. . . . Fees are allowed in a suit under Title II of the 1964 Act challenging discrimination in a private restaurant, but not in suits under 42 U.S.C. § 1983 redressing violations of the Federal Constitution *or laws* by officials who are sworn to uphold the laws.'" *Id.* at 35128, *quoting from* Awarding of Attorneys' Fees: Hearings Before the Subcomm. on Courts, Civil Liberties, & the Admin. of Justice of the House Comm. on Judiciary, 94th Cong., 1st Sess. 85 (1975) ("House Hearings"). (Emphasis added.)

Similarly, the Senate Report on S. 2278, the Senate version of H.R. 9552, reveals that the Senate Judiciary Committee sup-

* In *Blue* v. *Craig* — a case, like *Thiboutot*, based entirely on federal rights secured by the Social Security Act, 42 U.S.C. §§ 1396a *et seq.*, and regulations promulgated thereunder — the District Court sua sponte dismissed the complaint for failure to state a claim under Section 1983. The Fourth Circuit, declining to read the phrase "and laws" out of Section 1983, had "no difficulty in resolving that this action, which seeks to invalidate a state-wide regulation alleged to deprive the plaintiffs of civil rights given them by the Social Security Act, even if regarded as being wholly statutorily-based, qualifies under § 1983." *Id.* at 836. (Footnote omitted.)

ported the enactment of Section 1988 in order to provide attorneys' fees "in suits under 42 U.S.C. § 1983 redressing violations of the Federal Constitution or laws by officials sworn to uphold the laws." S. Rep. No. 94-1011, 94th Cong., 2d Sess. 4 (1976) ("Senate Report"). See 121 Cong. Rec. 26806 (1975) (remarks of Senator Tunney introducing S. 2278).

Echoing Representative Drinan's remarks (p. 7 *supra*), Senator Kennedy, a sponsor of S. 2278, in the Senate floor debate, cited as an example of the need for the attorneys' fees bill the situation that had arisen in *Bond* v. *Stanton*, 528 F.2d 688 (7th Cir. 1976).* 122 Cong. Rec. 33314 (1976). *Bond* v. *Stanton* was a Section 1983 action based solely on state officials' violation of federal statutory law — the Medicaid provisions of the Social Security Act. Shortly thereafter, Senator Abourezk, the floor manager of the bill, advised the Senate, "This legislation is intended to cover cases based on both constitutional and statutory rights, including supremacy clause cases. See 42 U.S.C. § 1983." 122 Cong. Rec. at 33315.

Representative Drinan and the Senate Committee described Section 1983 as a "civil rights law." This nomenclature derived in part from the popular name, the "Reconstruction Civil Rights Acts," which included R.S. 1979. See Senate Report at 4; House Hearings at 84-85; cf. 122 Cong. Rec. 35122 (1976) (remarks of Representative Drinan). Mr. Derfner described "civil rights cases," in this context, as those "enforcing the rights of minority groups and poor people," including cases "in which a statute is not being enforced" by the government.

* *Vacated and remanded*, 429 U.S. 973 (1976), *opinion on remand*, 555 F.2d 172 (7th Cir. 1977), *cert. denied*, 438 U.S. 916 (1978). The court on remand referred to Senator Kennedy's comments in holding that attorneys' fees were available in a statutory Section 1983 action. 555 F.2d at 174. Maine, in its list of Senator Kennedy's examples of the cases to which the amendment was intended to apply, omits Senator Kennedy's reference to *Bond* v. *Stanton* (Maine Brief at 21-22 & n.29).

House Hearings at 81, 100. Congress's nomenclature is echoed by the American Bar Association's broad definition of the phrase "civil rights law" in its widely publicized 1975 resolution on lawyers' pro bono publico obligations, as "[l]egal representation involving a right of an individual which society has a special interest in protecting" — an expansive concept that includes many federal statutory entitlements within its scope. See PI-8-75-S26 (approved by ABA, August 1975), quoted in "Implementing the Lawyers' Public Interest Practice Obligation," American Bar Assn. Monograph, 1977.*

Maine argues that Section 1983 creates a cause of action against state officials or other persons acting under color of state law only if they deprive a person of rights, privileges or immunities "arising under the Constitution or [equal rights] laws." The addition of the language Maine wishes to see in the statute — a feat not normally accomplished by the federal courts and an unauthorized amendment of Section 1983 — would deny the benefits of Section 1988 fee awards to a class of cases that Congress explicitly intended to include.

* The greater number of references in the legislative history to "discrimination" cases does not point to a different definition of "civil rights." Not surprisingly, Congress was more concerned with the more significant body of discrimination law — in the year ended June 30, 1976, 11,885 discrimination cases were filed in federal district courts, 9.3% of the total 130,597 civil filings, while only 222 welfare cases were filed, a mere 0.17% of the total civil filings. Administrative Office of the U.S. Courts, 1976 Annual Report of the Director. It is patent that Congress did not amend Section 1988 to provide attorneys' fee awards solely in discrimination cases — indeed, as Congress itself noted, fees in most discrimination cases were already available under preexisting law.

II. Restricting Section 1983 Actions to Constitutional and Equal Rights Violations Would Seriously Impair Congress's Objectives in Amending Section 1988.

In amending Section 1988, Congress's primary purpose was to ensure that important federally-created rights could be enforced by those who could not afford to hire a lawyer. See Senate Report at 2, 6 ("In many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer"; "If our civil rights laws are not to become mere hollow pronouncements which the average citizen cannot enforce, we must maintain the traditionally effective remedy of fee shifting in these cases"); 122 Cong. Rec. 31471 (1976) (remarks of Senator Scott); *id.* at 31472 (remarks of Senator Kennedy); *id.* at 33314 (remarks of Senator Tunney); *id.* at 35128 (remarks of Representative Seiberling).

The ruling that Maine seeks from this Court — that Section 1983 actions can be brought, and attorneys' fees awarded, only to enforce federal constitutional or equal rights — would seriously undermine Congress's objectives in amending Section 1988. Such a ruling not only would limit the enforceability of statutory rights but also would increase substantially the cost and complexity of litigation and reduce the availability of lawyers to the very class of persons Congress intended to protect. These increases in cost would be both tangible and intangible. Maine's interpretation would stimulate unnecessary constitutional adjudication, thereby increasing the expenditure of judicial time. It would increase lawyer time for each case and thereby reduce the number of people whom pro bono publico projects such as amici could serve. It would increase awarded attorney's fees, thereby costing the states more. And it would limit the ability to vindicate federal statutory rights to the very poor or the very wealthy.

A. The Involvement of Private Lawyers is Essential in Litigation to Enforce Federal Statutory Rights.

In amending Section 1988, Congress recognized that the private bar plays a critically important role in the vindication of federal statutory rights. H.R. Rep. No. 1558, 94th Cong., 2d Sess. 3 (1976) ("House Report"). This recognition is borne out by the Action Plan, in which the Boston Bar Association found that a poor litigant represented by a legal services lawyer had a probability of a favorable outcome (including settlement) of 73%; if represented by a private lawyer, this probability rose slightly to 79%; but with no lawyer, a poor litigant's chance of success dropped to 49%. Thus, in the variety of legal situations studied, the presence of a lawyer substantially increased a poor person's chances of obtaining a favorable outcome. Action Plan, Table 18, p. 47. The Action Plan also found that legal services offices in Boston were able to meet less than one-third of the recognized legal needs of Boston's poor inhabitants and that the involvement of the private bar in Boston to provide legal services to the poor was essential. *Id.* at 6-8, 105-122.

A more recent Boston study, directly examining the impact of legal representation on obtaining a federal statutory entitlement — the right of a child with special education needs to receive an adequate and appropriate education (see 20 U.S.C. §§ 1411 *et seq.*) — is even more emphatic. Lower-income parents and children, the study found, are virtually incapable of obtaining a favorable outcome in the federally-mandated hearing process (see 20 U.S.C. § 1415) without a lawyer or legal representative. J. Abramson, Special Education and Due Process: A Study of In-School Maintenance Cases Brought to Administrative Appeal Under Chapter 766 (Massachusetts) (unpublished thesis, Boston University, School of Education) (1979), at 81-82. Thus, in the twenty-seven cases studied

where the parent was represented, the parent won (including obtaining an "acceptable" settlement) twenty cases and lost seven. In the twenty cases where the parent was not represented, the parent won six cases and lost fourteen. *Id.* at 82. This study illustrates again the vital importance of legal assistance to the vindication of federally guaranteed rights.

The importance of the private bar in meeting the legal needs of the poor is further evidenced by the American Bar Association's resolution in August 1975, confirming that "it is a basic professional responsibility of each lawyer engaged in the practice of law to provide public interest legal services." PI-8-75-S26 (approved by ABA, August 1975). The American Bar Association affirmed that lawyers have an ethical obligation to provide pro bono publico services in five areas, defined as poverty law, civil rights law, public rights law, charitable organization representation, and administration of justice. *Id.* See also ABA Code of Professional Responsibility Ethical Consideration 2-25.

In amending Section 1988, Congress recognized the serious negative impact of *Alyeska* on the availability of private legal resources for the poor. Indeed, the House Report cited the testimony of witnesses from the National Lawyers' Committee, the Council for Public Interest Law and other pro bono publico projects that *Alyeska* would have a "devastating impact" on their programs. Congress also considered evidence, equally applicable here, that elimination of fee awards from "civil rights" — including federal statutory — cases will have an equally debilitating effect on the willingness of lawyers in public interest law firms or other small firms to handle such litigation, since these lawyers must, as a matter of economics, obtain at least some fees from this work.

Thus, in a report cited by Congress, House Report at 3, n.3, the Council of Public Interest Law, quoting an attorney with the NAACP Legal Defense and Education Fund, Inc., explained the impact of *Alyeska* on an attorney in private practice with a small firm who had wanted to devote a substantial portion of his time to enforce public policy:

> "The real impact of the ruling will be in terms of our work with private attorneys in the South. Awarded fees have never been a significant part of our budget. . . . In most cases we work with private lawyers, and it matters to them in terms of the amount of civil rights work they are willing to take on.
>
> "When we go to a guy now in the South, and ask him to take on a prison case, most of which are brought under these older laws [including R.S. 1979], he'll say he can't do it. He'll have to put thousands of hours into it without any hope of getting paid. It will be different if we ask him to take an employment case under the 1964 Civil Rights Act because he can anticipate some fee award if he wins it." Balancing the Scales of Justice: Financing Public Interest Law in America, A Report by the Council for Public Interest Law 316 (1978).

Thirty-four of the forty-four private public interest law firms surveyed by the Council reported that they had claims adversely affected by *Alyeska*. *Id.* at 318. "Even worse," the Council continued, "those 34 reported that they will be unable to do as much public interest work as a result of the Supreme Court's decision." *Id.*

Congress amended Section 1988 in large measure to eliminate such an impact and to reduce the strain on the resources of the private bar. House Report at 3. This Court should not excise this congressional policy from the statute.

B. Interpreting Section 1983 to Require Litigants to State a Claim Under the Constitution or Equal Rights Laws Will Add to the Cost and Complexity of Section 1983 Litigation and Will Reduce the Availability of Lawyers for the Poor.

1. *Maine's Position Will Cause the Unnecessary Assertion and Defense of Constitutional Claims, Thereby Wasting the Limited Resources of the Private Bar and Increasing the Cost of Section 1983 Litigation.*

Maine's proposed revision of the unambiguous language of Section 1983, that a cause of action under that statute must assert rights secured under the Constitution or under equal rights laws, will save Maine $5,622.06 in attorneys' fees and expenses in this case (A. 37-38), because the Thiboutots' lawyer, having stated a violation of the Thiboutots' state and federal statutory rights so plainly that Maine did not even appeal from the grant of summary judgment against it below (A. 31-32, 43-44, 50), did not feel compelled to add to the complaint a colorable constitutional claim.

Maine's effort to save $5,622.06, if adopted, will substantially increase the burden on the federal courts and the costs of Section 1983 litigation to the states and to poor people seeking to use the courts to vindicate federally guaranteed statutory rights.

To state a cause of action under the Constitution sufficient to bring a claim in federal court, *see Chapman* v. *Houston Welfare Rights Organization*, 441 U.S. 600 (1979), a litigant must meet the test of substantiality set out in *Hagans* v. *Lavine*, 415 U.S. 528 (1974) — he must state a claim that is not "so attenuated and unsubstantial as to be absolutely devoid of merit," "wholly insubstantial," "obviously frivolous" or "no longer open to discussion." *Id.* at 536, 537. (Citations omitted.)

Hagans requires a federal district court first to determine whether the constitutional claim appears to be nonfrivolous on its face. If so, the court has jurisdiction and then must decide any pendent state or federal statutory claims, if possible, to avoid unnecessary constitutional adjudication.

Maine's reading of Section 1983, if accepted, would force plaintiffs' counsel to state barely colorable constitutional claims, sufficient under *Hagans*, in order to bring Section 1983 actions. Of course, all such cases could then be brought in federal court, under 28 U.S.C. § 1343(3). And the majority of statutory Section 1983 cases would continue to be brought. Many, if not most, cases brought to enforce a federal statutory right contain within them the seed of a federal constitutional claim. See, e.g., *Edelman* v. *Jordan*, 415 U.S. 651, 653 n.1, 655-56 (1974) (42 U.S.C. § 1382(a)(8) and the equal protection clause); *Gagne* v. *Maher*, 594 F.2d 336, 341 (2d Cir.), *cert. granted*, 48 U.S.L.W. 3189 (1979); *Blue* v. *Craig*, *supra*, 505 F.2d at 844; *Kruse* v. *Campbell*, 431 F. Supp. 180, 185-86 (E.D. Va. 1977) (right of handicapped child to education; case arising under Rehabilitation Act of 1973, 29 U.S.C. § 794, and Social Security Act, 42 U.S.C. § 625, as well as under equal protection and due process clauses), *vacated and remanded* for determination on statutory grounds, 434 U.S. 808 (1977).

Maine's reading of Section 1983 would dramatically increase the cost, duration and complexity of Section 1983 actions. Thus, in the experience of amici, the statement of a colorable constitutional claim invites a state defendant's immediate assertion of a motion, pursuant to Fed. R. Civ. P. 12(b)(6), to dismiss the complaint for failure to state a claim. The probability of the assertion of a Rule 12(b)(6) motion would increase if its determination would end the entire litigation, as would be the case if the phrase "and laws" were read out of Section 1983. And where the recovery of attorneys' fees also depends on the determination of a constitutional claim, it

is certain that a state would make that preliminary challenge. Further, as a practical matter, many federal courts would increase the threshold showing of substantiality, thereby further increasing the complexity of the litigation. Compare, e.g., *Randall* v. *Goldmark*, 495 F.2d 356 (1st Cir. 1974), with *Blue* v. *Craig*, *supra*.

At present, many private attorneys who are not involved with law reform but who, like the panel attorneys in the Project, are concerned solely with representation of an individual client to achieve a desired result, will abstain from raising constitutional claims where there is a plain statutory right. This spareness of pleading has a single justification: to reduce the time, cost and complexity of litigation, so as to achieve the desired result as quickly as possible. Moreover, constitutional law is complex and rapidly-changing, and to the corporate and commercial attorneys who form the nucleus of the Project's volunteer lawyers panel, it is an unfamiliar area.

The increase in constitutional adjudication that will result from Maine's proposed revision of Section 1983 is a costly and wasteful use of the time and resources of every participant in the litigation process. Such unnecessary constitutional litigation is uneconomical from the perspective of the states, which may eventually have to pay increased fees under Section 1988. It would unnecessarily burden the courts with an increased amount of complex constitutional litigation and would provoke substantial unnecessary constitutional adjudication, in violation of the well-established principle that courts should avoid deciding constitutional issues unless it is absolutely necessary. *New York City Transit Authority* v. *Beazer*, ____ U.S. ____, 59 L.Ed.2d 587, 600 (1979); *Rescue Army* v. *Municipal Court of Los Angeles*, 331 U.S. 549, 568-74 (1947); *Specter Motor Service, Inc.* v. *McLaughlin*, 323 U.S. 101 (1944); *Seals* v. *Quarterly County Court*, 562 F.2d 390, 392 (6th Cir. 1977).

Most unfortunately, however, the unnecessary complexity of such litigation would waste the amici's most valuable resource — the time of the individual lawyer — and would reduce the availability of legal representation to the poor, contrary to Congress's intent in enacting the 1976 amendment to Section 1988. As noted above, Project panel lawyers spent an average of twenty hours per case on the 2,000 cases the Project handled last year. Panel lawyers raising a federal statutory claim, unencumbered with constitutional claims or class action allegations, will spend an average of approximately 40-60 hours per case, for an average cost, if fees were awarded, of $3,000-$4,500. Constitutional litigation, on the other hand, is complex litigation, requiring in the Lawyers' Committee's experience an average of hundreds of hours per case, and the cost of such litigation can easily exceed $100,000. Compare, e.g., the fee award of less than $6,000 sought here with the $115,483.75 fees award in two prison reform cases upheld in *Palmigiano* v. *Garrahy*, No. 79-1185 (1st Cir. March 3, 1980). See also *Oliver* v. *Kalamazoo Board of Education*, 576 F.2d 714 (6th Cir. 1978) (school desegregation case, awarding $283,925 based on straight time, without multiplier); *Stanford Daily* v. *Zurcher*, 64 F.R.D. 680, 686-88 (N.D. Cal. 1974), *affirmed*, 550 F.2d 464 (9th Cir. 1977), *reversed on other grounds*, 436 U.S. 547 (1978) (search and seizure case, determined on summary judgment motion, awarding $47,500 in fees for 750 hours).

Each of the Project's 650 volunteer lawyers will give the Project a total time commitment of approximately 60 hours per year. A substantial increase in the amount of time any class of cases will take will reduce the total number of cases the Project can handle. A Project lawyer, in short, can take one constitutional case or three statutory cases every two years. Maine's proposed increase in constitutional litigation would thus reduce by as much as two-thirds the number of people the

Project can serve, from the 2,000 it presently serves, to 700 or fewer. This would seriously impair the Project's effort to make legal services broadly available to the poor in Boston.

2. *Maine's Position Would Unnecessarily Increase the Length of Time Needed to Determine a Case on the Merits.*

The unnecessary constitutional adjudication which Maine's statutory revision would require would also unnecessarily increase the length of time between the filing of a complaint and the determination by the court on the merits of the statutory claim. Cases to enforce federal statutory rights involve, as Congress recognized in amending Section 1988, issues which are significant to the litigants and to the public. The interpretation of the Social Security Act at issue in this case, for example, was extremely important to the Thiboutots' ability to support their family and to clothe, house and feed their children adequately. It was also important to Maine to receive a prompt adjudication of the lawfulness of its interpretation of the Social Security Act. And it is important to the judicial system that the public perceive courts as a place where problems are solved and cases determined expeditiously, thus ameliorating the "climate of public cynicism and mistrust of the legal profession, the judiciary, and the legal system." Janofsky, *A.B.A. Attacks Delay and the High Cost of Litigation*, 65 A.B.A.J. 1323 (1979).

If Section 1983 were now construed as requiring the assertion of a merely colorable constitutional claim in order to vindicate a federal statutory right, the federal courts will be deluged with difficult and time-consuming constitutional claims, which they will often have to adjudicate in order to determine questions of jurisdiction and the availability of attorneys' fees.

Such a ruling would truly open the floodgates to the federal courts.

3. *Maine's Position Would Discourage Consent Decrees.*

Maine's position, finally, would discourage parties from settling Section 1983 actions by entering into consent decrees which explicitly deny liability or the validity of a federal constitutional claim. The legislative history of Section 1988 and its subsequent judicial interpretations clearly reveal that a plaintiff who enters into such a consent decree may be considered a "prevailing party" entitled to attorneys' fees. Thus, the Senate Report explicitly states that "for purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief." Senate Report at 5. See *Gagne* v. *Maher*, *supra*; *Nadeau* v. *Helgemoe*, 581 F.2d 275, 279 (1st Cir. 1978); *Brown* v. *Culpepper*, 559 F.2d 274, 277 (5th Cir. 1977). See also, *Inmates of Nebraska Penal and Correctional Complex* v. *Greenholtz*, 567 F.2d 1381 (8th Cir. 1977) (plaintiffs were entitled to legal expenses, even though they were denied injunctive relief because defendants had discontinued the activities complained of before adjudication). If Maine's reading of Section 1983 were adopted, plaintiffs' lawyers would be unable to enter into a consent decree denying the existence of a constitutional claim, because of the unavailability of fees.

III. Maine Would Reintroduce the Inconsistency in the Availability of Attorneys' Fees that the Amendment to Section 1988 was Enacted to Eliminate.

In amending Section 1988, Congress had as an important additional objective the elimination of the inconsistent availa-

bility of attorneys' fees: although fees were explicitly available under some federal statutes protecting the rights, privileges and immunities of citizens, such fees were not, because of this Court's decision in *Alyeska*, available to vindicate rights under other equally important statutes. See Senate Report at 4; 121 Cong. Rec. 26806 (remarks of Senator Tunney).

Thus, Section 1983 litigation against state officials or persons acting under color of state law for violations of federal statutes pertaining to mental health, welfare, education of the handicapped, health, and housing are often brought by amici, but in many of these areas, no congressional authorization of fees exists other than Section 1988. These rights are of vital importance to the indigent and simply cannot be aggressively protected by counsel if attorneys' fees are unavailable.

When Congress enacted Section 1988, it sought to remedy the inconsistency whereby fees were available only for violation of some civil rights acts. Consistent with that purpose, this Court should interpret Section 1983 as including all civil deprivations by state officials of federal statutory rights. Any other interpretation would ignore the clear congressional concern to preserve incentives to challenge state deprivations of federal rights and would frustrate Congress's effort to provide the same pragmatic support to such challenges as it has provided in more recent civil rights statutes — and, one might add, in much commercial legislation.*

* A large number of commercial statutes provide for recovery of attorneys' fees as a practical way for private litigants to vindicate their federal statutory commercial rights. *See, e.g.*, Agricultural Unfair Trade Practices Act, 7 U.S.C. §§ 2305(a), (c) (suits against agricultural products handler for violations of the Act); Bankruptcy Act, 11 U.S.C. §§ 303(i) (11)(B), 503(b)(4); Communications Act of 1934, 47 U.S.C. § 206 (suits arising from violations of Act by common carriers); Interstate Commerce Act, 49 U.S.C. §§ 11705 (d)(3), 11708(c), 11710(b); Jewelers Hall-Mark Act, 15 U.S.C. §§ 298(b), (c), (d) (suits for violations of Act by falsely stamping gold or silver); Packers and Stockyards Act, 7 U.S.C. § 210(f) (suits for violations of Act by stockyard owner, market agency, or dealer); Plant Variety Act, 7 U.S.C. § 2565 (suits against infringers of "plant patents"); Securities Act of 1933, 15 U.S.C. § 78i(e) (suits for manipulation of security prices); Securities Exchange Act of 1934, § 78r(a) (suits for misleading statements); Trust Indenture Act, 15 U.S.C. § 77www(a) (suits for misleading statements).

Conclusion.

For the foregoing reasons, the amici curiae Volunteer Lawyers Project and Lawyers' Committee respectfully urge the Court to affirm the judgment of the Maine Supreme Judicial Court.

Respectfully submitted,

CAROL GOODMAN
SAMUEL HOAR
GOODWIN, PROCTER & HOAR
28 State Street
Boston, Massachusetts 02109
Attorneys for Amici Volunteer Lawyers Project of the Boston Bar Association and Lawyers' Committee for Civil Rights Under Law of the Boston Bar Association

Of Counsel:
KENNETH W. SIMONS
LEONARD G. LEARNER

Dated: April 5, 1980.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-~~383~~ 838

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STATE OF MAINE, ET AL,

Petitioners

v.

JOLINE AND LIONEL THIBOUTOT, ET AL,

Respondents

MOTION TO FILE SUPPLEMENTAL BRIEF after argument

Respondents move this Court for an Order permitting them to file a Supplemental Brief for the reasons set forth in that brief.

June 3, 1980

Robert Edmond Mittel
Sewall & Mittel
178 Middle Street - Box 431
Portland, Maine 04112
207-775-3101
ATTORNEY FOR RESPONDENTS

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-~~303~~ 838

RECEIVED
JUN 7 1980
OFFICE OF THE CLERK
SUPREME COURT, U.S.

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STATE OF MAINE, et. al.,

Petitioners

vs.

JOLINE AND LIONEL THIBOUTOT, et. al.,

Respondents.

* * * * * * * * * * * * *

On Writ of Certiorari to the
Supreme Judicial Court of the
State of Maine

SUPPLEMENTAL BRIEF OF RESPONDENTS

Hugh Calkins
CALKINS & WUESTHOFF
97A Exchange Street
Portland, Maine 04101

Robert Edmond Mittel
SEWALL & MITTEL
178 Middle Street
Portland, Maine 04112

Howard H. Dana, Jr.
VERRILL & CANA
Two Canal Plaza
Portland, Maine 04112

Susan Calkins
PINE TREE LEGAL ASSISTANCE, INC.
146 Middle Street
Portland, Maine 04101

Counsel for Respondents

June 3, 1980

INTRODUCTION

Because of the importance and particular relevance of recently enacted legislation, the Respondents submit this Supplemental Brief discussing the meaning of P.L. 96-247, signed by the President on May 23, 1980.

ARGUMENT

In adopting the Civil Rights of Institutionalized Persons Act, P.L. 96-247, a copy of which is attached,[1] Congress had before it 42 U.S.C. §1983 (R.S. 1979), and amended it by requiring that certain §1983 actions be continued for a period of time for the exhaustion of administrative remedies. P.L. 96-247, §7.[2] Although Section 7 of that Act will be codified

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1 This Act had been before the Congress for several years. It is derived from S.1393 of the 95th Congress and S.10 of the 96th Congress; in the House it is derived from H.R. 2439, H.R. 5791 and H.R. 9400 in the 95th Congress, and H.R. 10 in the 96th Congress. A copy of the bill reported by the Conference Committee which was enacted unchanged is attached.

2 This Section was viewed as an amendment to Section 1983, and was widely discussed throughout the legislative history. See, e.g., 125 Cong. Rec. H.3647-3648 (1979) (daily edition) (remarks of Rep. Kindness). Testimony of Peggy Weisberg, ACLU National Prison Project, Hearings Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the House Comm. on the Judiciary at 48, February 14, 1979; Supplemental Statement of Irving R. Segal, American Bar Association, Hearings Before the Sub-Comm. on the Constitution of the Senate Comm. on the Judiciary on S. 1393, 95th Cong. 1st Sess., at 437 (1977).

elsewhere, Congress was dealing directly with Section 1983 and left intact the phrase "and laws." This amendment was made with the knowledge of the years of judicial interpretation that §1983 applied to deprivations of federal statutory rights generally. Perhaps even more significantly, Congress affirmatively indicated its belief and intention that this was the correct scope of Section 1983.[3] Throughout the legislative history of P.L. 96-247, it was made clear that it was intended and believed the "constitution or laws" language in sections 3, 4 and 5 of the Act meant the same as the "Constitution and laws" language of §1983, and that the scope of both included general statutory deprivations.[4]

A letter of Assistant Attorney General Days to House Subcommittee Chairman Kastenmeier states that the Civil Rights of Institutionalized Persons Act "should have a similar scope" to §1983, and cites Blue v. Craig, 505 F.2d 830 (4th Cir. 1974) as exemplifying some of the statutory deprivations within that scope.[5]

On the floor of the Senate, the Subcommittee Chairman and sponsor of the Act, Senator Bayh, together with Senator Javits, expressed the view that "when there is a violation of a Federal constitutional provision or a violation of a Federal statute by a State or local government, an injured institutionalized person can sue under...Section 1983."[6] With this explanation of §1983 by the sponsor of the Civil Rights of Institutionalized Persons Act which in part amends §1983, Congress enacted P.L. 96-247, which became law on May 23, 1980.

Clearly, Congress has adopted and incorporated into §1983 the interpretation given the statute in Blue v. Craig, supra, and the cases cited in the Respondents' Brief.

Respectfully submitted,

Robert E. Mittel
Hugh Calkins
Howard H. Dana, Jr.
Susan Calkins

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3 See, e.g., 126 Cong. Rec. S.1886 (Feb. 27, 1980) (daily edition) (remarks of Sen. Bayh); letter of Assistant Attorney General Drew S. Days III, Hearings Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the House Comm. on the Judiciary on H.R. 2439 and H.R. 5791, 95th Cong. 1st Sess., ser. 28 at 326-327; J. J. Regan, When Nursing Home Patients Complain, 65 Geo. L. J. 691 (1977), Hearings on H.R. 2439 and H.R. 5791, ser. 28, supra, at 838.

4 See, e.g., Letter of Assistant Attorney General Days, supra, n.2; Letter of Philip Gassel, Legal Services for the Elderly, Hearings on H.R. 2439 and H.R. 5791, ser. 28, supra, n.2 at 475; Statement of C. Raymond Marvin, Nat'l. Ass'n. of Attorneys General, Id., ser. 28 at 89; 124 Cong. Rec. H.7477 (July 28, 1978) (daily edition) (remarks of Rep. Kastenmeier, sponsor); Id., at H.7486 (remarks of Rep. Butler); Id., at H.7487 (remarks of Rep. Railsback quoting a Justice Dept. opinion); H.R. Rep. 96-80 p.6 (1979); S. Rep. 95-1036, Appendix A p. 32 (1977).

5 Supra, n.3; This letter was discussed extensively in debate. See, e.g., Remarks of Reps. Wiggins and Butler, supra, n.4. Blue v. Craig is discussed in greater detail in Respondents' Brief at 25 and 28.

6 Supra, n.3.

STATE OF MAINE

CUMBERLAND, ss. June 3, 1980

I hereby certify that I have mailed a copy of the within Supplemental Brief of Respondents to James E. Smith, Esquire, as attorney for Petitioners, postage prepaid, first class mail.

Robert Edmond Mittel

96TH CONGRESS
2d Session
HOUSE OF REPRESENTATIVES
REPORT
No. 96-897

CIVIL RIGHTS OF INSTITUTIONALIZED PERSONS ACT

APRIL 22, 1980.—Ordered to be printed

Mr. KASTENMEIER, from the committee of conference submitted the following

CONFERENCE REPORT

[To accompany H.R. 10]

The committee of conference on the disagreeing votes of the two Houses on the amendment of the Senate to the bill (H.R. 10), to authorize actions for redress in cases involving deprivations of rights of institutionalized persons secured or protected by the Constitution or laws of the United States, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the House recede from its disagreement to the amendment of the Senate and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the Senate amendment insert the following:

That this Act may be cited as the "Civil Rights of Institutionalized Persons Act".

SEC. 2. DEFINITIONS.

As used in this Act—

(1) The term "institution" means any facility or institution—

(A) which is owned, operated, or managed by, or provides services on behalf of any State or political subdivision of a State; and

(B) which is—

(i) for persons who are mentally ill, disabled, or retarded, or chronically ill or handicapped;

(ii) a jail, prison, or other correctional facility;

(iii) a pretrial detention facility;

(iv) for juveniles—

(I) held awaiting trial;

(II) residing in such facility or institution for purposes of receiving care or treatment; or

(III) residing for any State purpose in such facility or institution (other than a residential facility providing only elementary or secondary education that is not

an institution in which reside juveniles who are adjudicated delinquent, in need of supervision, neglected, placed in State custody, mentally ill or disabled, mentally retarded, or chronically ill or handicapped); or

(v) providing skilled nursing, intermediate or long-term care, or custodial or residential care.

(2) Privately owned and operated facilities shall not be deemed "institutions" under this Act if—

(A) the licensing of such facility by the State constitutes the sole nexus between such facility and such State;

(B) the receipt by such facility, on behalf of persons residing in such facility, of payments under title XVI, XVIII, or under a State plan approved under title XIX, of the Social Security Act, constitutes the sole nexus between such facility and such State; or

(C) the licensing of such facility by the State, and the receipt by such facility, on behalf of persons residing in such facility, of payments under title XVI, XVIII, or under a State plan approved under title XIX, of the Social Security Act, constitutes the sole nexus between such facility and such State;

(3) The term "person" means an individual, a trust or estate, a partnership, an association, or a corporation;

(4) The term "State" means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, or any of the territories and possessions of the United States;

(5) The term "legislative days" means any calendar day on which either House of Congress is in session.

SEC. 3. INITIATION OF ACTIONS.

(a) Whenever the Attorney General has reasonable cause to believe that any State or political subdivision of a State, official, employee, or agent thereof, or other person acting on behalf of a State or political subdivision of a State is subjecting persons residing in or confined to an institution, as defined in section 2, to egregious or flagrant conditions which deprive such persons of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States causing such persons to suffer grievous harm, and that such deprivation is pursuant to a pattern or practice of resistance to the full enjoyment of such rights, privileges, or immunities, the Attorney General, for or the name of the United States, may institute a civil action in any appropriate United States district court against such party for such equitable relief as may be appropriate to insure the minimum corrective measures necessary to insure the full enjoyment of such rights, privileges, or immunities, except that such equitable relief shall be available under this Act to persons residing in or confined to an institution as defined in section 2(1)(B)(ii) only insofar as such persons are subjected to conditions which deprive them of rights, privileges, or immunities secured or protected by the Constitution of the United States.

(b) In any action commenced under this section, the court may allow the prevailing party, other than the United States, a reasonable attorney's fee against the United States as part of the costs.

(c) Any complaint filed by the Attorney General pursuant to this section shall be personally signed by him.

SEC. 4. CERTIFICATION REQUIREMENTS.

(a) At the time of the commencement of an action under section 2 the Attorney General shall certify to the court—

(1) that at least 49 calendar days previously he has notified in writing the Governor or chief executive officer and attorney general or chief legal officer of the appropriate State or political subdivision and the director of the institution of—

(A) the alleged conditions which deprive rights, privileges, or immunities secured or protected by the Constitution or laws of the United States and the alleged pattern or practice of resistance to the full enjoyment of such rights, privileges, or immunities;

(B) the supporting facts giving rise to the alleged conditions and the alleged pattern or practice, including the dates or time period during which the alleged conditions and pattern or practice of resistance occurred; and when feasible, the identity of all persons reasonably suspected of being involved in causing the alleged conditions and pattern or practice at the time of the certification, and the date on which the alleged conditions and pattern or practice were first brought to the attention of the Attorney General; and

(C) the minimum measures which he believes may remedy the alleged conditions and the alleged pattern or practice of resistance;

(2) that he has notified in writing the Governor or chief executive officer and attorney general or chief legal officer of the appropriate State or political subdivision and the director of the institution of his intention to commence an investigation of such institution, that such notice was delivered at least seven days prior to the commencement of such investigation and that between the time of such notice and the commencement of an action under Section 3 of this Act—

(A) he has made a reasonable good faith effort to consult with the Governor or chief executive officer and attorney general or chief legal officer of the appropriate State or political subdivision and the director of the institution, or their designees, regarding financial, technical, or other assistance which may be available from the United States and which he believes may assist in the correction of such conditions and pattern or practice of resistance;

(B) he has encouraged the appropriate officials to correct the alleged conditions and pattern or practice of resistance through informal methods of conference, conciliation and persuasion, including, to the extent feasible, discussion of the possible costs and fiscal impacts of alternative minimum corrective measures, and it is his opinion that reasonable efforts at voluntary correction have not succeeded; and

(C) he is satisfied that the appropriate officials have had a reasonable time to take appropriate action to correct such conditions and pattern or practice, taking into consideration the time required to remodel or make necessary changes in physical facilities or relocate residents, reasonable legal or procedural requirements, the urgency of the need to correct such conditions, and other circumstances involved in correcting such conditions; and

(3) that he believes that such an action by the United States is of general public importance and will materially further the vindication of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.

(b) Any certification made by the Attorney General pursuant to this section shall be personally signed by him.

SEC. 5. INTERVENTION IN ACTIONS.

(a)(1) Whenever an action has been commenced in any court of the United States seeking relief from egregious or flagrant conditions which deprive persons residing in institutions of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States causing them to suffer grievous harm and the Attorney General has reasonable cause to believe that such deprivation is pursuant to a pattern or practice of resistance to the full enjoyment of such rights, privileges, or immunities, the Attorney General, for or in the name of the United States, may intervene in such action upon motion by the Attorney General.

(2) The Attorney General shall not file a motion to intervene under paragraph (1) before 90 days after the commencement of the action, except that if the court determines it would be in the interests of justice, the court may shorten or waive the time period.

(b)(1) The Attorney General shall certify to the court in the motion to intervene filed under subsection (a)—

(A) that he has notified in writing, at least fifteen days previously, the Governor or chief executive officer, attorney general or chief legal officer of the appropriate State or political subdivision, and the director of the institution of—

(i) the alleged conditions which deprive rights, privileges, or immunities secured or protected by the Constitution or laws of the United States and the alleged pattern or practice of resistance to the full enjoyment of such rights, privileges, or immunities;

(ii) the supporting facts giving rise to the alleged conditions, including the dates and time period during which the alleged conditions and pattern or practice of resistance occurred; and

(iii) to the extent feasible and consistent with the interests of other plaintiffs, the minimum measures which he believes may remedy the alleged conditions and the alleged pattern or practice of resistance; and

(B) that he believes that such intervention by the United States is of general public importance and will materially further the vindication of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.

(2) Any certification made by the Attorney General pursuant to this subsection shall be personally signed by him.

(c) *Any motion to intervene made by the Attorney General pursuant to this section shall be personally signed by him.*

(d) *In any action in which the United States joins as an intervenor under this section, the court may allow the prevailing party, other than the United States, a reasonable attorney's fee against the United States as part of the costs. Nothing in this subsection precludes the award of attorney's fees available under any other provisions of the United States Code.*

SEC. 6. PROHIBITION OF RETALIATION.

No person reporting conditions which may constitute a violation under this Act shall be subjected to retaliation in any manner for so reporting.

SEC. 7. EXHAUSTION OF REMEDIES.

(a)(1) *Subject to the provisions of paragraph (2), in any action brought pursuant to section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983) by an adult convicted of a crime confined in any jail, prison, or other correctional facility, the court shall, if the court believes that such a requirement would be appropriate and in the interests of justice, continue such case for a period of not to exceed ninety days in order to require exhaustion of such plain, speedy, and effective administrative remedies as are available.*

(2) *The exhaustion of administrative remedies under paragraph (1) may not be required unless the Attorney General has certified or the court has determined that such administrative remedies are in substantial compliance with the minimum acceptable standards promulgated under subsection (b).*

(b)(1) *No later than one hundred eighty days after the date of enactment of this Act, the Attorney General shall, after consultation with persons, State and local agencies, and organizations with background and expertise in the area of corrections, promulgate minimum standards for the development and implementation of a plain, speedy, and effective system for the resolution of grievances of adults confined in any jail, prison, or other correctional facility. The Attorney General shall submit such proposed standards for publication in the Federal Register in accordance with section 553 of title 5, United States Code. Such standards shall take effect thirty legislative days after publication unless, within such period, either House of Congress adopts a resolution of disapproval of such standards.*

(2) *The minimum standards shall provide—*

(A) *for an advisory role for employees and inmates of any jail, prison, or other correctional institution (at the most decentralized level as is reasonably possible), in the formulation, implementation, and operation of the system;*

(B) *specific maximum time limits for written replies to grievances with reasons thereto at each decision level within the system;*

(C) *for priority processing of grievances which are of an emergency nature, including matters in which delay would subject the grievant to substantial risk of personal injury or other damages;*

(D) *for safeguards to avoid reprisals against any grievant or participant in the resolution of a grievance; and*

(E) *for independent review of the disposition of grievances, including alleged reprisals, by a person or other entity not under the direct supervision or direct control of the institution.*

(c)(1) *The Attorney General shall develop a procedure for the prompt review and certification of systems for the resolution of grievances of adults confined in any jail, prison, or other correctional facility, or pretrial detention facility, to determine if such systems, as voluntarily submitted by the various States and political subdivisions, are in substantial compliance with the minimum standards promulgated under subsection (b).*

(2) *The Attorney General may suspend or withdraw the certification under paragraph (1) at any time that he has reasonable cause to believe that the grievance procedure is no longer in substantial compliance with the minimum standards promulgated under subsection (b).*

(d) *The failure of a State to adopt or adhere to an administrative grievance procedure consistent with this section shall not constitute the basis for an action under sections 3 or 5 of this Act.*

SEC. 8. REPORT TO CONGRESS.

The Attorney General shall include in his report to Congress on the business of the Department of Justice prepared pursuant to section 522 of title 28, United States Code—

(1) *a statement of the number, variety, and outcome of all actions instituted pursuant to this Act including the history of, precise reasons for, and procedures followed in initiation or intervention in each case in which action was commenced;*

(2) *a detailed explanation of the procedures by which the Department has received, reviewed and evaluated petitions or complaints regarding conditions in institutions;*

(3) *an analysis of the impact of actions instituted pursuant to this Act, including, when feasible, an estimate of the cost incurred by States and other political subdivisions;*

(4) *a statement of the financial, technical, or other assistance which has been made available from the United States to the State in order to assist in the correction of the conditions which are alleged to have deprived a person of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States; and*

(5) *the progress made in each Federal institution toward meeting existing promulgated standards for such institutions or constitutionally guaranteed minima.*

SEC. 9. PRIORITIES FOR USE OF FUNDS.

(a) *It is the intent of Congress that deplorable conditions in institutions covered by this Act amounting to deprivations of rights protected by the Constitution or laws of the United States be corrected, not only by litigation as contemplated in this Act, but also by the voluntary good faith efforts of agencies of Federal, State, and local governments. It is the further intention of Congress that where Federal funds are available for use in improving such institutions, priority should be given to the correction or elimination of such unconstitutional or illegal conditions which may exist. It is not the intent of this provision to require the redirection of funds from one program to another or from one State to another.*

SEC. 10. NOTICE TO FEDERAL DEPARTMENTS.

At the time of notification of the commencement of an investigation of an institution under section 3 or of the notification of an intention to file a motion to intervene under section 5 of this Act, and if the relevant institution receives Federal financial assistance from the Department of Health and Human Services or the Department of Education, the Attorney General shall notify the appropriate Secretary of his action and the reasons for such action and shall consult with such officials. Following such consultation, the Attorney General may proceed with an action under this Act if he is satisfied that such action is consistent with the policies and goals of the executive branch.

SEC. 11. DISCLAIMER—STANDARDS OF CARE.

Provisions of this Act shall not authorize promulgation of regulations defining standards of care.

SEC. 12. DISCLAIMER—PRIVATE LITIGATION.

The provisions of this Act shall in no way expand or restrict the authority of parties other than the United States to enforce the legal rights which they may have pursuant to existing law with regard to institutionalized persons. In this regard, the fact that the Attorney General may be conducting an investigation or contemplating litigation pursuant to this Act shall not be grounds for delay of or prejudice to any litigation on behalf of parties other than the United States.

And the Senate agree to the same.

ROBERT W. KASTENMEIER,
GEORGE E. DANIELSON,
ROMANO L. MAZZOLI,
HERBERT E. HARRIS II,
LAMAR GUDGER,
BOB CARR,
TOM RAILSBACK,
CARLOS J. MOORHEAD,
HAROLD S. SAWYER,
Managers on the Part of the House.

BIRCH BAYH,
HOWARD M. METZENBAUM,
HOWELL HEFLIN,
DENNIS DECONCINI,
ORRIN G. HATCH,
Managers on the Part of the Senate.